IN THE

Supreme Court of the United States

October Term, 1976

76-1807

No. .....

STATE, *ex rel* GENUINE PARTS COMPANY
and SENTRY INSURANCE COMPANY

Appellants,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

JURISDICTIONAL STATEMENT

EUGENE E. KLECAN
Attorney of Record for Appellants
505 Marquette NW Suite 1221
Albuquerque, New Mexico 87102

INDEX

INDEX OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1976

No.....

STATE *ex rel* GENUINE PARTS COMPANY
and SENTRY INSURANCE COMPANY,

Appellants,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

JUDISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants, Genuine Parts Company and Sentry Insurance Company, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and that the Court should exercise such jurisdiction in this case.

OPINIONS BELOW

The Supreme Court of the State of New Mexico entered its judgment denying appellants' petition for a writ of mandamus without rendering an opinion in the matter.

Similarly, the Supreme Court of the State of New Mexico denied appellants' petition for a writ of certiorari without opinion.

This case calls into question the denial of all argument by the Court of Appeals of the State of New Mexico in an opinion by that court in the case of Mary Ann Garcia, plaintiff-appellee v. Genuine Parts Company and Sentry Insurance Company, defendants-appellants. This opinion was reported in 15 N.M. Adv. Sh. 1661, February 3, 1977. Insofar as this opinion constitutes appellants' sole notice of the denial of oral argument on appeal, it is relevant to the issues herein.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a judgment of the Supreme Court of the State of New Mexico denying appellants' petition for a writ of mandamus. A timely notice of appeal was filed on May 18, 1977, in the Supreme Court of the State of New Mexico. The jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1257(2), whereby the actions of the Court of Appeals of the State of New Mexico have the full force and effect of a statute.

QUESTIONS PRESENTED

1. Whether a denial of oral argument on an appeal of right, without notice, and without authority of either rule or tradition, constitutes a denial of the due process and equal protection clauses of the United States Constitution, amendment fourteen.

2. Whether a client's constitutional right of effective representation by counsel, under the United States Constitution, amendment fourteen, applies in the context of an appeal of right, so as to preclude an unauthorized exclusion of oral argument.

STATEMENT OF THE CASE

The facts of the case underlying this appeal are as follows:

This case arose as a workmen's compensation action in the District Court of New Mexico.[1] There were several issues involved in the action which were ones of first impression involving statutory interpretation of the New Mexico workmen's compensation statue.[2]

Appellants, Genuine Parts Company and Sentry Insurance Company (hereinafter cited as *Genuine*) filed an appeal from the New Mexico District Court judgment pursuant to N.M. Stat. Ann § 16-7-8(B) (1966) in the respondents' court. Both parties to the appeal timely filed requests for oral argument[3] and precluded waiver under N.M. Stat. Ann. § 21-12-18(C) (Supp. 1975) which reads as follows:

> Any party may file written request for oral argument at or before the time of filing his first brief addressed to the merits. In the *absence of such request, oral argument will be deemed waived* and the cause will stand submitted on briefs unless the appellate court shall otherwise direct. (emphasis ours)

Briefs were then filed and both parties awaited notice of the setting for oral argument pursuant to N.M. Stat. Ann. §21-12-18(A) (Supp. 1975). Rather than sending a notice

[1] App. G *infra*.
[2] N.M. Stat. Ann § 59-10-1, *et. seq.* (1953 Comp.).
[3] App. I *infra*.

of hearing as provided for in this rule, the court of appeals delivered its opinion, wherein it was stated: "Oral argument is unnecessary. The judgment is affirmed."[4]

The New Mexico Constitution guarantees an absolute right to one appeal.[5] Pursuant to this article, the legislature provided the procedures by which oral argument would be heard.[6] There is *no rule* authorizing a discretionary denial of oral argument on appeal. The absence of this authorization is of particular note because discretion *is* authorized in the case of motions.[7] In addition, it had been well-settled in tradition and practice that oral argument was to be granted on appeal when requested.[8]

The authority to make such substantial procedural changes rests solely with the Supreme Court of New Mexico,[9] and then only through rule making procedures requiring thirty (30) days notice.[10]. In view of this, *Genuine* sought a rehearing. It was in the petition for rehearing that the federal questions were first raised. A rehearing was denied on January 31, 1977.[11] *Genuine* then filed a petition for certiorari with the Supreme Court of New Mexico. The federal questions involved were raised once again. On March 2, 1977, *Genuine* received notice that this too was denied.[12]

The final state remedy available to *Genuine* was a petition for a writ of mandamus to the Supreme Court of New

---

[4] App. F *infra* at p. 29.
[5] N.M. Const. art. 6 § 2.
[6] N.M. Stat. Ann. § 16-2A-1 (Supp. 1975).
[7] N.M. Stat. Ann. § 21-12-18(B) (Supp. 1975).
[8] See App. H *infra*.
[9] N.M. Stat. Ann. § 18-1-1 (1941).
[10] N.M. Stat. Ann. § 21-3-1 (1939).
[11] App. D *infra*.
[12] App. C *infra*.

Mexico. The petition requested the supreme court to issue a writ of mandamus ordering the Honorable Joe W. Wood and the Clerk of the Court of Appeals of the State of New Mexico:

(1) to withdraw an opinion and mandate heretofore filed in the court of appeals, Cause No. 2547;

(2) to accord to petitioners an appeal pursuant to law and take appropriate steps to recall the mandate heretofore issued and reinstate the cause on the docket of the court of appeals; or

(3) to certify said appeal to the Supreme Court of the State of New Mexico.

At the hearing, *Genuine* argued specific violations of both the state and federal constitutions. Pertinent herein, *Genuine* argued:

(1) that the denial of oral argument by the court of appeals, without notice, prescribed procedure or standards was a violation of the due process clause of the fourteenth amendment of the United States Constitution;

(2) that the denial constituted an infringement of *Genuine's* right to full and effective representation by counsel, again in violation of the fourteenth amendment to the United States Constitution, and;

(3) that the denial interfered with the practice of law since counsel relied and had every right to rely on oral argument for the effective advocacy of *Genuine's* position.

The counsel of record for the plaintiff below, Mary Ann Garcia, made an appearance at oral argument and argued against *Genuine's* motion for the writ of mandamus. The

Supreme Court of New Mexico denied the writ without opinion.[13] And the court of appeals has continued to deny oral arguments in the same manner as herein described.[14]

Having no further remedies available within the state judicial system, *Genuine* hereby prays the United States Supreme Court grant this appeal from the final judgment of the Supreme Court of the State of New Mexico.

[13] App. B *infra*.
[14] Peralta v. Martinez, et al., 16 N.M. Adv. Sh. 1820 (May 19, 1977).

SUBSTANTIALITY OF FEDERAL QUESTIONS

1. This appeal presents important and substantial questions, as hereinafter described, in that a decision in this case requires a delicate balancing of the relationship between the dual court system and persons subject to its jurisdiction. Central to the case *sub judice* is that a state court of appeals made an unauthorized diversion from established practice and procedure in violation of the United States Constitution.[1] It is well settled that:

> No change in procedure can be made which disregards those fundamental principles (notice and hearing) ascertained from time to time by judicial action, which relate to process of law, protect the citizen in his private right, and guard him against the arbitrary action of government.[2]

2. The United States Constitution does not demand that a state guarantee an appeal. However, the fourteenth amendment is controlling once an appeal is provided.[3] Whether or not due process calls for an oral argument on appeal is not at issue here. But one issue which is before the Court is whether *notice of the possibility* that oral argument will not be heard is a necessary element of a constitutional appeal.

In this case, notification that oral argument would not be heard was contained in the opinion rendered by the appellees.[4] This is a classic illustration of notice after the fact. An appeal could not be properly effectuated by counsel on the briefs where oral argument was expected and not given

[1] U.S. Const. amend. XIV.
[2] Twining v. New Jersey, 221 U.S. 78 (1908).
[3] U.S. Const. amend. XIV, *construed in* e.g, Griffin v. Illinois, 351 U.S. 12 (1956); *In re* Brown, 439 F.2d 47 (3d Cir. 1971).
[4] App. F *infra* at p. 29.

since the brief will necessarily reflect this expectation. Therefore, petitioner contends that notice was not only a necessary element, but that the denial of this notice was tantamount to a denial of its appeal of right[5] as well as a denial of precedent set by tradition.[6]

3. A second and concurrent factor which this Court is being asked to consider is the constitutionality of this action by the court of appeals where the action is taken without authority and where the rules actually granting authority to another body are abrogated. The Supreme Court of New Mexico is imbued with the exclusive power to change the procedural rules.[7] Since thirty (30) days notice of any change is required, the court of appeals not only acted without authority, but did not even comply with the rule making procedures.[8] This is clearly a violation of the due process guaranteed by the fourteenth amendment.[9] Every citizen is entitled to protection of this federal right. If the state courts will not provide it, the federal courts must. Thus, the question here presented is substantial.[10]

4. As is presented in the second question before this Court, the petitioner's fourteenth amendment right to be fully represented by counsel has also been affected by respondents' actions. A study of case law indicates that this right has been consistently protected at the trial court level in both civil and criminal cases, as well as on appeal in

[5] *Cf.* FCC v. WJR Goodwill Station, Inc., 337 U.S. 265 (1949); Season-all Indus., Inc. v. Turkiye Sis Ve Cam Fabrik, A.S., 425 F.2d 34, 39 (3d Cir. 1970).

[6] See Cohen v. Hurley, 366 U.S. 117 (1961); *cf.* Groendyke Transport, Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969).

[7] N.M. Stat. Ann. § 18-1-1 (1941).

[8] N.M. Stat. Ann. § 21-3-1 (1939).

[9] U.S. Const. amend. XIV, *construed in* Twining v. New Jersey *supra* at n.2.

[10] For a further discussion of the substantiality of this question see Conclusion *infra* at p. 10.

criminal cases.[11] Petitioner now asks this Court to hold that the right to full representation by counsel on appeal applies to the state appellate courts in a civil action.

In this case, there were several issues of first impression involving an interpretation of New Mexico's workmen's compensation law.[12] In fact, not one issue decided on this appeal had ever before been addressed by the courts.[13] The effects of this decision were necessarily far reaching and even in other jurisdictions where preclusion of oral argument is provided for by rule, oral argument would not have been denied.[14]

Counsel thus prepared his brief expecting to give oral argument on some of the issues. These two methods were properly integrated to form a non-redundant, effective appeal. By closing off one avenue of persuasion from the court's view, the effectiveness of the efforts of counsel was necessarily diminished and effective representation was thus denied.

> [A] litigant's right to be fully represented by counsel is an integral part of that 'due process of law' which every resident of this . . . nation whose legal rights are being adjudicated can freely invoke.[15]

Indeed, it would be an anomoly to provide this protection in the trial court and to deny it on appeal where the judgment below can be enhanced or expunged. Appellants are, therefore entitled to relief.

[11] *Eg.*, United States v. Walls, 443 F.2d 1220 (6th Cir. 1971); United States *ex rel* Spears v. Johnson, 327 F.Supp. 1021 (E.D. Pa. 1971); see *generally* 38 A.L.R. 2d 1396.

[12] N.M. Stat. Ann. § 59-10-1, *et. seq.* (1953 Comp.)

[13] App. H *infra* at ¶ 9.

[14] See e.g., Southside Bank & Trust Company, et. al. v. Walston & Company, 425 F.2d 40 (7th Cir. 1970).

[15] Nestor v. George, 354 Pa. 19, 46 A.2d 469, 473 (1946).

5. This case provides just one example of what now appears to be a continuing injury. On May 19, 1977, the Honorable Joe Wood once again denied a litigant an oral argument on appeal, but this time the case involved a new definition regarding the time the statute of limitations begins to run in a malpractice suit.[16] The denial of oral argument was once again stated in the last sentence of the opinion. The decision overruling prior definitions was, once again, one of great importance. The seriousness of the violation of due process becomes more pronunced as the court of appeals repeats this unconstitutional action. It is important that this appeal be heard.

CONCLUSION

The petitioners thus pray the Supreme Court of the United States to give effect to the fourteenth amendment under these two theories and preclude unlawful arbitrary actions by a state's court of appeals.

In the last decade, major upheavals have occurred which have obliterated the traditional boundaries of power in the democratic system. The pendulum has begun its swing back once again. The Supreme Court has recognized this and exercised self-restraint time and again in the "due process" decisions of last term.[17] The fourteenth amendment similarly requires that state courts exercise restraint as to persons protected by the United States Constitution. It is the role of the Court today to get the divisions of government back on the traditional paths as defined by the law. The case herein is the perfect vehicle to assist in this task.

---

16 Peralta v. Martinez, et al., 16 N.M. Adv. Sh. 1820 (May 19, 1977).

17 See e.g., Paul v. Davis, ... U.S. ....., 96 S.Ct. 1155 (1976); Bishop v. Wood, ... U.S. ....., 96 S.Ct. 2074 (1976).

In the first instance, there are clearly defined issues which lend themselves to valid interpretation as precedent. A state court should be compelled to give notice before substantially interferring with its own procedures,[18] or with the right to full representation by counsel on appeal.

Secondly, each of these issues has been previously settled in other contexts. A decision in this case will form a much needed completion to already set bodies of law.[19]

And finally, review of this case is not only compelled by a sense of justice, but is also centered within the proper province of Supreme Court jurisdiction. As far back as 1923, a similar review was given in *Wagner Electric Manufacturing Co. v. Lyndon.*[20] In that case, petitioners claimed a denial of due process and alleged as error the fact that only a quorum of the judges, rather than the full court, heard oral argument on appeal. The fourth judge made his decision on the briefs. The *Wagner* court under Chief Justice Taft considered this deviation so slight as to be "at most, an irregularity."[21] This leads to the conclusion that if the deviation had been major (such as the total denial of oral argument) a violation of due process would have enured. And this is the same court which held in this same case that a state's denial of the right to a jury trial was not a violation of due process!

The courts are where due process begins. They define it and impose these definitions on other bodies. Truly, they must then afford it as well.

---

18 Twining v. New Jersey, supra at n.2.

19 See *generally*, 38 A.L.R.2d 1396 (summary of the law on the right to effective assistance of counsel).

20 262 U.S. 226 (1923).

21 *Id.*, at 232.

For the reasons stated above, appellants submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated

Respectfully submitted,

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
505 Marquette NW Suite 1221
Albuquerque, New Mexico 87102
Attorneys for Appellants

APPENDIX A

SUPREME COURT OF
THE STATE OF NEW MEXICO

STATE, ex rel. GENUINE
PARTS COMPANY and SENTRY
INSURANCE COMPANY,

Petitioners,

-vs- No. 11,333

COURT OF APPEALS OF THE
STATE OF NEW MEXICO and
THE HONORABLE JOE W. WOOD,

Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Genuine Parts Company and Sentry Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico, denying a petition for a Writ of Mandamus, entered in this proceeding on March 23, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

DATED: May 17, 1977

KLECAN & ROACH, P.A.

s/Eugene E. Klecan

EUGENE E. KLECAN
Attorney for Petitioners
Suite 1221 - 505 Marquette Ave. N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-7731, 243-4419

PROOF OF SERVICE:
CERTIFICATE OF SERVICE BY MAIL

I, Eugene E. Klecan, a member of the Bar of the Supreme Court of the United States and counsel of record for Genuine Parts Company and Sentry Insurance Company, appellants herein, hereby certify that on May 17, 1977, pursuant to Rule 33(3)(b), Rules of the Supreme Court, I served three copies of the attached Notice of Appeal and enclosed jurisdictional statement on each of the parties herein as follows:

On Hazel M. Davis as Clerk of the Court of Appeals of the State of New Mexico, appellee herein, by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to the post office address of the Court of Appeals of the State of New Mexico at Santa Fe, New Mexico.

On the Honorable Joe W. Wood, appellee herein, by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to the Honorable Joe W. Wood, Chief Judge, the Court of Appeals for the State of New Mexico, Santa Fe, New Mexico.

On Mary Ann Garcia, a party to the action below, by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to William E. Snead, counsel of record for Mary Ann Garcia at 2001 12th Street N.W., Post Office Box 2226, Albuquerque, New Mexico 87103.

All parties required to be served have been served.

DATED: May 17, 1977

KLECAN & ROACH, P.A.

s/Eugene E. Klecan
EUGENE E. KLECAN
Attorney for Petitioners
Suite 1221 - 505 Marquette Ave. N.W.
Albuquerque, New Mexico 87102
Telephone: (505) 243-7731, 243-4419

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Wednesday, March 23, 1977

No. 11,333

STATE, ex rel GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Petitioners,

-vs- Original Mandamus Proceeding

COURT OF APPEALS OF THE STATE OF NEW MEXICO, and HON. JOE W. WOOD,

Respondents.

This matter coming on for consideration by the Court upon petition for alternative writ of mandamus, and the Court having considered said petition and being sufficiently advised in the premises:

NOW, THEREFORE, IT IS ORDERED that petition for alternative writ of mandamus be and the same is hereby denied.

ATTEST: A TRUE COPY

ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Monday, February 28, 1977

No. 11,293

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Petitioners,

-vs- Original Proceeding on Certiorari

MARY ANN GARCIA,

Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Cause No. 2547 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

MARY ANN GARCIA,

Plaintiff-Appellee,

-vs- No. 2547

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Defendants-Appellants.

MOTION FOR RE-HEARING

(Court ruling inserted at end of motion.)

We respectfully request an opportunity to present all of these arguments and request a rehearing on this case because of the errors and the denial of the opportunity to present oral argument.

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
Attorneys for Defendants-Appellants
Suite 1221, 505 Marquette NW
Albuquerque, N.M. 87102
Telephone: 243-7731

I HEREBY CERTIFY that a true
copy of the foregoing was
delivered to opposing counsel
this 28th day of January, 1977.

E. E. KLECAN

THE MOTION FOR REHEARING IS DENIED THIS 31st DAY OF JANUARY, 1977.

JOE W. WOOD
Chief Judge

APPENDIX E

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

No. 2547

GENUINE PARTS CO., etal,

Appellants,

Bernalillo County
No. 12-74-16772

MARY ANN GARCIA,

Appellee.

MANDATE

(Applicable items are indicated by an "X" below.)

1. . x . . Attached is a true and correct copy of the original decision entered in the above-entitled cause.

2. . x . . This decision being now final, the cause is remanded to you for any further proceedings consistent with said decision.

3. . . . . Writ of Certiorari having been issued by the New Mexico Supreme Court and their decision now being final, this cause is remanded to you for any further proceedings consistent with said Supreme Court decision attached hereto.

4. . . . . You are directed to issue any commitment necessary for the execution of your judgment and sentence.

5. . . . . Cost Bill is assessed as follows:

6. . . . . District Court Clerk's Record returned herewith.

7. . x . . Exhibits filed herein shall be picked up at this Clerk's Office forthwith.

By direction of and in the name of the Chief Judge of the Court of Appeals, this 2nd day of March, 1977.

(SEAL)
cc: Counsel

HAZEL M. DAVIS
Clerk of the Court of Appeals of
the State of New Mexico.

(Tear off and return this receipt)

NO. 2547

RECEIPT IS ACKNOWLEDGED of the original mandate and Clerk's Record.

DATED:

Clerk of the District Court

ATTEST: A true copy.

HAZEL M. DAVIS
Clerk of the Court of Appeals
of the State of New Mexico

APPENDIX F

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

MARY ANN GARCIA,
Plaintiff-Appellee,

-v- No. 2547

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,
Defendants-Appellants.

COURT OF APPEALS OF NEW MEXICO
FILED JANUARY 18, 1977
HAZEL M. DAVIS
Clerk

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
STOWERS, Judge

ARTURO G. ORTEGA, MICHAEL D. BUSTAMANTE
ORTEGA, SNEAD and DIXON
Albuquerque, New Mexico
Attorneys for Appellee,

JAMES T. ROACH
KLECAN & ROACH, P.A.
Albuquerque, New Mexico
Attorneys for Appellants.

OPINION

WOOD, Chief Judge.

Defendants appeal the judgment in favor of plaintiff in this workmen's compensation case. The issues raised

group into two categories: (1) proof of disability, and (2) basis for liability for medical expenses.

Plaintiff was accidentally injured while at work on December 31, 1973. She filed a complaint seeking workmen's compensation benefits in December, 1974. The case was tried in January, 1976. The transcript on appeal was filed in this Court on August 6, 1976; briefing was completed on November 29, 1976. See §§59-10-13.10(A) and 59-10-16.1, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) concerning the advancement of workmen's compensation cases on court calendars.

There is evidence that a heavy box fell on a co-worker's foot; that upon lifting the box, plaintiff felt a sharp pain in her back that went down into her legs. This was immediately reported to plaintiff's manager who inquired whether plaintiff wished to continue working or wanted to go home. There is evidence that plaintiff continued working, but with increasing pain. During her luncheon time, on the day of the accident, plaintiff went to the emergency room of a hospital where she was told not to return to work for three days and to avoid heavy lifting on her return. Plaintiff was seen by Dr. Cornish on January 24 and February 28, 1974; Dr. Cornish diagnosed a muscle strain.

Plaintiff was seen by Dr. Hollinger on January 29 and February 11, 1974. Up until April, 1974 she was being seen by a chiropractor. She returned to Dr. Hollinger in August, 1974 with increased complaints and has remained under his care. This care included a laminectomy in October, 1974 and a laminectomy and fusion in February, 1975. There is evidence that the fusion was a "non-union" and that an additional surgical procedure is necessary.

Proof of Disability

The trial court found that plaintiff was totally disabled at the time of trial and had been since the accident on De-

cember 31, 1973. Defendants raise three issues in connection with this finding.

Two of the issues are based on the testimony of defendants' medical witness, Dr. Parnall, who disagreed with Dr. Hollinger as to the need for Dr. Hollinger's surgical procedures. Defendants claim they cannot be held liable for aggravation of plaintiff's condition caused by unskillful medical treatment by a physician chosen by plaintiff. Defendants also claim an absence of substantial evidence to support an award of total disability in that any disability was caused by negligence of physicians chosen by plaintiff. Both contentions are directed to Dr. Hollinger's treatment; we assume, but do not decide, that Dr. Hollinger was selected by plaintiff.

These two issues are based on claims of unskillful medical treatment and negligence on the part of Dr. Hollinger. Evidentiary support for these claims is necessarily based on Dr. Parnall's testimony. Assuming, but not deciding, that Dr. Parnall's testimony provides such support, we have a conflict in the evidence; the medical experts were in disagreement.

Defendants recognize that this conflict exists. They contend we should not decide these two issues on the basis of substantial evidence. Although the trial court found that Dr. Hollinger's treatment was necessary, defendants would have us disregard this finding. In essence, defendants ask us to weigh the evidence, determine that Dr. Hollinger was not to be believed and hold that the facts are those inferable from Dr. Parnall's testimony.

We do not weigh the evidence on appeal; rather we view the evidence in the light most favorable to support the findings of the trial court. Duran v. New Jersey Zinc Company, 83 N.M. 38, 487 P.2d 1343 (1971). There is substantial evidence that Dr. Hollinger's treatment was necessary and that plaintiff's disability resulted from the accident of December 31, 1973.

A third issue under this point is that there is no proof of disability between February 11, 1974 and August 23, 1974. During this period plaintiff was not seen by Dr. Hollinger. The evidence is that during this period of time, plaintiff visited a chiropractor and may have been treated in the emergency room of a hospital. The chiropractor did not testify; there is no medical evidence concerning emergency room treatment, if any. For this period of time Dr. Hollinger testified: "I would not really be able to state whether or not she could work."

Defendants state: "Dr. Hollinger admitted that there was no medical probability that . . . [plaintiff] was disabled" during the period in question. They assert that §59-10-13.3(B), N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1) precludes an award of compensation for this period.

Defendants misconstrue Dr. Hollinger's testimony. The quoted testimony went only to an inability to testify as to working ability during the period in question; it did not go to whether disability did or did not exist during this period. Compare, Mares v. City of Clovis, 79 N.M. 759, 449 P.2d 667 (Ct.App. 1968). Other testimony of Dr. Hollinger was to the effect that plaintiff was continuously disabled to some extent after the injury occurred. Dr. Parnall testified there was some interference with plaintiff's work due to the injury, but he could not say how long this "lame back" would have lasted if surgery had not been done. The first surgery was performed subsequent to the time period in question.

Section 59-10-13.3(B), supra, reads:

> "B. In all cases where the defendants deny that an alleged disability is a natural and direct result of the accident, the workman must establish that causal connection as a medical probability by expert medical testimony. No award of compensation shall be based on speculation or on expert testimony that as a medical possibility the causal connection exists."

This section requires the causal connection between the disability and the accident be established as a medical probability by expert medical testimony. Both Dr. Hollinger's and Dr. Parnall's testimony met this requirement. See Gammon v. Ebasco Corporation, 74 N.M. 789, 399 P.2d 279 (1965).

Neither physician testified as to the extent of plaintiff's disability during the period in question. Section 59-10-13.3(B), supra, does not require that the extent of the disability be established as a medical probability by expert medical testimony. "Disability" is defined in terms of ability to perform work and requires consideration of the claimant's age, education, training, physical capacity, mental capacity and work experience. Sections 59-10-12.18 and 12.19, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1). By statutory definition, more than physical condition is involved in determining "disability". See Goolsby v. Pucci Distributing Company, 80 N.M. 59, 451 P.2d 308 (Ct.App. 1969).

Once causation is established by appropriate medical evidence, the absence of medical testimony as to the *extent of disability* does not bar a disability award. The extent of disability may be established by the plaintiff. See Seay v. Lea County Sand and Gravel Company, 60 N.M. 399, 292 P.2d 93 (1956). Plaintiff's testimony was substantial evidence supporting the award of total disability during the period in question.

Basis for Liability for Medical Expenses

The medical bills were substantial. The trial court found the bills were reasonable in amount and were incurred in the necessary treatment of plaintiff. It also found that additional medical and hospital care would be required in the future, and that plaintiff was entitled to be paid for reasonable future expenses. Defendants raise two issues in connection with these findings.

The first issue goes to the sufficiency of the evidence

to support the findings. They concede that Dr. Hollinger testified that the bills were reasonable in amount and that the treatment reflected by the bills was necessary. Because the trial court adopted plaintiff's requested findings, defendants urge a "more stringent mode of review". Again, defendants are asking this Court to weigh the evidence, to disregard Dr. Hollinger's testimony and to accept Dr. Parnall's testimony. We are not fact finders, but a court of review. The trial court resolved the evidentiary conflicts. It is not our function to weigh the evidence, but to determine whether substantial evidence supports the challenged findings. Duran v. New Jersey Zinc Company, supra. The findings are supported by substantial evidence.

The second issue goes to the basis for holding defendant liable for the medical bills, and involves the meaning of §59-10-19.1, N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 1). The pertinent portion of that section reads:

> "A. After injury, and continuing as long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, physical rehabilitation services, medical, osteopathic, chiropractic, dental, optometry and hospital services and medicine, not to exceed the sum of forty thousand dollars ($40,000), unless the workman refuses to allow them to be so furnished.
>
> "B. In case the employer has made provisions for, and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention and offers to furnish these services during the period necessary, then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or medicine than those so provided . . . ."

Language similar to that appearing in Paragraph A of §59-10-19.1, supra, was interpreted in Johnson v. Armstrong

& Armstrong, 41 N.M. 206, 66 P.2d 992 (1937). *Johnson* states that the language in Paragraph A:

> "imports more than a mere passive willingness or duty to furnish medical and surgical aid when called upon. It allows the employer to select his own physicians and surgeons for the care of his injured employees, but imports that arrangements should be made in advance, or that some one should be at hand in authority to provide medical and surgical care in cases of emergency like the one here considered. Case of Ripley, 229 Mass. 302, 118 N.E. 638; In re Panasuk (In re American, etc., Co.), 217 Mass. 589, 105 N.E. 368."

The two Massachusetts cases cited in *Johnson*, supra, elucidate. In Re Panasuk, 217 Mass. 589, 105 N.E. 368 (1914) states that the obligation to provide medical services is imposed by the express words of the statute:

> "This duty must be performed or reasonable efforts made to that end before the statutory obligation is satisfied. . . . The word 'furnish' in such connection imports something more than a passive willingness to respond to a demand. It implies some degree of active effort to bring to the injured person the required humanitarian relief."

In re Ripley, 229 Mass. 302, 118 N.E. 638 (1918) affirmed the foregoing quotation from *Panasuk*, supra.

2 Larson's Workmen's Compensation Law, §61.12, p. 10-453, states:

> "[T]he first issue that sometimes comes into litigation is the question whether the initiative lies with the employee to apply for medical benefits, or with the employer to call attention to their availability and furnish them without being asked. It is usually held that, when the employee has furnished the employer with the facts of his injury, it is up to the employer to instruct the employee on what to do to obtain medical attention, and to inform him regarding the medical and surgical aid to be furnished."

See Draney v. Industrial Accident Commission, 95 Cal.App. 2d 64, 212 P.2d 49 (1949); Teague v. Graining Hardwood Manufacturing Co., 238 Miss. 48, 117 So.2d 342 (1960); Compare Cross v. Wichita Compressed Steel Company, 187 Kan. 344, 356 P.2d 804 (1960).

The evidence is uncontradicted that defendants made no active effort to provide medical attention. When plaintiff reported the accident and her back and leg pain to her manager, the only inquiry was whether plaintiff wanted to continue working or go home. The manager never mentioned medical attention. Plaintiff went to the hospital emergency room on her own initiative. She went to see Dr. Cornish either on the recommendation of some one in the emergency room or because he had previously treated her for an unrelated illness; the evidence supports either view.

However, there is no issue in this appeal concerning the emergency room charge on the date of the accident or Dr. Cornish's bill. Defendants assert that they paid these bills. The trial court refused to so find, and properly under the record which is before us, because the deposition on which defendants rely has not been included in the record on appeal. However, we will assume that defendants did pay these bills.

Defendants claim they are not liable for the bills incurred in connection with Dr. Hollinger's treatment. These are the bills for which plaintiff recovered judgment. Defendants assert they are not liable for these bills under Paragraph B of §59-10-19.1, supra. On the basis that they paid the emergency room charge and Dr. Cornish's bill, they assert that they were furnishing adequate medical attention and therefore are not liable to furnish additional medical services. They point out that plaintiff never requested them to provide additional medical services, never asserted that Dr.

Cornish's services were inadequate, failed to keep an appointment with Dr. Cornish and on the day of the unkept appointment, went to Dr. Hollinger on her own initiative. They rely on cases where the employer was providing medical services. See, for example: Dudley v. Ferguson Trucking Company, 61 N.M. 166, 297 P.2d 313 (1956); Provencio v. New Jersey Zinc Co., 86 N.M. 538, 525 P.2d 898 (Ct.App. 1974) and cases cited in *Provencio*.

We have assumed that defendants paid the emergency room charge and Dr. Cornish's bill. Does this assumption require a conclusion that defendants were furnishing medical services to plaintiff? No. There is nothing in this record showing when the bills were paid; we note that Dr. Cornish's report to the insurance company was written more than ten months after the date of his examination. Plaintiff testified that she did not know who paid these bills; she never knew that defendants were willing to provide medical treatment; she selected the physicians that did in fact treat her. The facts here do not show that defendants undertook their obligations to pay plaintiff's medical expenses. See Security Insurance Co. of Hartford v. Chapman, 88 N.M. 292, 540 P.2d 222 (1975).

Defendants' position is that they had no obligation other than to respond to requests for medical attention. We have pointed out that "furnish" in Paragraph A of §59-10-19.1, supra, requires more than a passive willingness to respond to a demand. Paragraph B of the statute requires an "offer to furnish" medical services to avoid liability for the services procured by plaintiff. "Furnish" in Paragraph B also requires more than a passive willingness to respond to a demand.

Before defendants can avoid liability under Paragraph B of §59-10-19.1, supra, they must have provided medical services or they must have affirmatively offered the services. Assuming defendants did in fact pay two medical bills incurred by plaintiff on her own initiative, this assumption shows no more than a passive willingness to respond. See

McCoy v. Industrial Accident Commission, 48 Cal.Rptr. 858, 410 P.2d 362 (1966). Not having offered medical services, §59-10-19.1(B), supra, is not applicable. Dudley v. Ferguson Trucking Company and the rules discussed in Provencio v. New Jersey Zinc Co., supra, are also inapplicable. Defendants are liable for the medical services which plaintiff procured.

Oral argument is unnecessary. The judgment is affirmed. Having considered the issues litigated on appeal and the time necessarily expended in responding to defendants' contentions, plaintiff is awarded $3,000.00 for the services of her attorneys in the appeal.

IT IS SO ORDERED.

JOE W. WOOD
Chief Judge

WE CONCUR:

WILLIAM R. HENDLEY, J.
LEWIS R. SUTIN, J.

STATE OF
NEW MEXICO COUNTY OF BERNALILLO

IN THE DISTRICT COURT

MARY ANN GARCIA,

Plaintiff,

-vs- No. 12-74-16772

GENUINE PARTS COMPANY, et al,

Defendants.

JUDGMENT

THIS CAUSE having come on for trial on the merits before the Court, plaintiff appearing personally, and by and through her counsel, ORTEGA, SNEAD, DIXON AND HANNA, by Arturo G. Ortega, defendants appearing by and through their attorneys of record, the law firm of KLECAN & ROACH, P.A., by Eugene E. Klecan and John A. Klecan, and the Court after hearing the testimony of the witnesses, considering all material marked into evidence, hearing the arguments of counsel, and considering the authorities submitted to it, having found the issues herein in favor of plaintiff and having made and filed its Findings of Fact and Conclusions of Law favorable to plaintiff, and pursuant to which,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff be, and she hereby is, declared totally and permanently disabled within the meaning of the Workmen's Compensation Act of the State of New Mexico.

2. The defendants be, and they hereby are, ordered to pay plaintiff the maximum benefits provided by that Act, which pursuant to the Court's Findings of Fact and Conclusions of Law, are hereby decreed to be $65.00 dollars per week, in the following manner, to-wit:

a. Past and accrued compensation benefits from the date of the injury sustained by plaintiff on December 31, 1973, to the date of the entry of judgment herein shall be paid in a lump sum equal to the number of weeks described herein times Sixty Five Dollars ($65.00).

b. Weekly compensation benefits shall be paid at the rate of Sixty Five Dollars ($65.00) per week from the date of entry of judgment herein until further order of the Court, but in no event to exceed a period of five hundred weeks from the date of plaintiff's accident.

3. That the defendant be, and they hereby are, ordered to pay the following medical and hospitalization expenses incurred by plaintiff to the date of trial:

Albuquerque Anesthesia Services, Ltd.	$ 166.40
Eugene W. Wasylenki, M.D.	189.28
Albuquerque Prosthetic Center	140.00
Joseph Hollinger, M.D.	2,910.05
Albuquerque Anesthesia Services, Ltd.	239.20
B. Ruppe Drugstore	112.32
Miscellaneous Prescriptions	106.58
Presbyterian Hospital Center	4,916.82
Prescriptions - Furr's Pharmacy	65.78

4. That defendants be, and they hereby are, ordered to pay plaintiff future medical expenses which may be incurred and may be necessary in the future for the treatment of residual injuries and disabilities naturally and directly arising from the accidental injury suffered by plaintiff on December 31, 1973, all in accordance with the New Mexico Workmen's Compensation Act.

5. That the defendants be, and they hereby are, ordered to pay plaintiff's attorneys the sum of Three Thousand Five Hundred Dollars ($3,500.00) as and for their services rendered herein.

6. That defendants be, and they hereby are, ordered to pay plaintiff's costs herein as they may hereinafter be assessed by the Court.

DISTRICT JUDGE

SUBMITTED AS TO FORM:

MICHAEL D. BUSTAMANTE
Of Counsel for Plaintiff

Of Counsel for Defendants

APPENDIX H

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1976

No. .....

STATE *ex rel* GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Appellants,

-vs-

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

ATTORNEY'S CERTIFICATE

COMES NOW EUGENE E. KLECAN and states as follows:

1. I am a member in good standing of the both the bars of the State of New Mexico and the United States Supreme Court.

2. I have been engaged in the practice of law since 1954; a total of 23 years.

3. In that time, I recall no appellate case in the Supreme Court of New Mexico where I did not have an oral argument. To my recollection all supreme court cases had an oral argument unless both parties agreed to submit the matter on

brief. Oral argument was a traditional right recognized as such by all the bench and bar.

4. Until 1967 the Supreme Court of New Mexico was the sole appellate court. Since then we have had two appellate tribunals with many appeals still going directly to the supreme court.

5. I have had numerous appeals in both appellate tribunals since the creation of the court of appeals, and never did I fail to have an oral argument on any case. There was one recent exception on November 30, 1976, when the court of appeals affirmed our case without granting an oral argument even though requested. No basis for not allowing oral argument was stated.

6. Other cases during the year 1976-1977 have allowed oral arguments and there is no distinction made in any way as to why oral argument was allowed in one case and denied in another.

7. I believe the Rules of Appellant Procedure provide for an oral argument on an appeal. Section 16-2H-1(b) states: "Settings for oral argument *will* be fixed by the court and notice thereof given to counsel." I was awaiting this notice of oral argument from the clerk's office of the court of appeal since all parties had "requested" oral arguments.

The Rules of Appellate Procedure were fixed by the Supreme Court which rule making power is not possessed nor shared in by our intermediate court of appeals.

Since the issue of "due process" was raised in the appellate tribunals of New Mexico, in this case, the court of appeals also denied the right of oral argument without any stated reason. (We did not participate in that case.) The practice of law in New Mexico continues then to function, as to oral argument, at the whim of the New Mexico Court of Appeals.

8. Since some are allowed oral argument and others denied it, without any governing principle it is also in violation of the equal protection of the laws provision of the fourteenth amendment of the United States Constitution.

I believe that a constitutional right is *per se* a right which resides in the private citizen even though its protection needs the aid of the judiciary. I believe under these circumstances that the right of oral argument, not in the abstract and universal sense, but in the concrete setting of this denial with all of its attending circumstances of law and tradition and lack of notice, is a denial of a constitutional right. It does not exist at the discretion of the government in any of its functioning powers. I sincerely believe that oral argument was a vital step in a complete presentation of my client's legal position in this case.

9. This appeal raised original questions for review as even the appellee's brief admits. It cannot be considered a repetitious type of appeal. The opinion neglected to even treat one major new issue raised in the brief.

Eugene E. Klecan
Suite 1221 - 505 Marquette, N.W.
Albuquerque, New Mexico 87101

COURT OF APPEALS OF NEW MEXICO

REQUEST FOR ORAL ARGUMENT

MARY ANN GARCIA,

Plaintiff-Appellee,

-v- No. 2547

GENUINE PARTS CO., et al.

Defendants-Appellants.

The undersigned counsel for Genuine Parts Co., et al in the above entitled cause hereby requests that the same be set down for oral argument.

Eugene E. Klecan
Counsel for Appellants

CONSTITUTION AND STATUTES OF THE STATE OF NEW MEXICO

NEW MEXICO CONSTITUTION

Art. VI, §2

Sec. 2. [Supreme Court's appellate jurisdiction.]

Appeals from a judgment of the district court imposing a sentence of death or life imprisonment shall be taken directly to the Supreme Court. In all other cases, criminal and civil, the Supreme Court shall exercise appellate jurisdiction as may be provided by law; provided that an aggrieved party shall have an absolute right to one appeal. (As amended September 28, 1965.)

NEW MEXICO STATUTES

16-2A-1. Rule 1—Terms, sessions and hearings.

(a) The Supreme Court shall hold one term each year, commencing on the second Wednesday in January, and shall be at all times in session at the seat of government; provided that the court may, from time to time, take such recess as in its judgment may be proper. (N.M. Const., art. VI, §7.)

(b) Settings for oral argument will be fixed by the court and notice thereof given to counsel.

(c) Except as otherwise specifically ordered, a session will be held on the Wednesday after the first Monday of each Month for hearing motions. All motions as to which the time for filing briefs has expired will be heard on such motion days or be deemed submitted on briefs.

(d) Either party, at or before the filing of his first brief on the merits, may file written request for oral argument. In the absence of such request, oral argument will be

deemed waived, and the cause will stand submitted on the briefs unless the court shall otherwise direct.

(e) The court will order oral arguments, without application therefor, in such cases as it deems such arguments essential.

(f) Two or more cases involving the same question may be heard together, by leave of the court.

(g) Criminal cases and cases involving matters of general public interest or policy may be advanced for oral argument or decision by leave of the court and upon the motion of either party.

(h) Oral arguments of twenty minutes will be allowed each side on motions and of thirty minutes on each side on all other matters, unless the time shall be extended or abridged by the court.

(i) Unless otherwise ordered, the appellant or plaintiff in error shall open and close the argument.

(j) If any cause shall not be decided during the term at or during which it was argued or submitted, it shall stand and be deemed continued from term to term until disposed of. Judgment shall be entered on the filing of a written opinion concurred in by a majority of the justices.

(k) Whenever the justices before whom a law question has been heard, shall so desire, others of the justices may be called in to take part in the decision, upon a perusal of the record and briefs, without a formal reargument, unless one of the parties make objection at the argument.

16-7-8. Court of appeals — Appellate jurisdiction — The appellate jurisdiction of the court of appeals is coextensive with the state, and the court has jurisdiction to review on appeal.

B. all actions under the Workmen's Compensation Act [59-10-1 to 59-10-37], the New Mexico Occupational Disease Disablement Law [59-11-1 to 59-11-42], the Subsequent Injury Act [59-10-126 to 59-10-138] and the Federal Employers' Act;

18-1-1. Rules defining and regulating practice of law — Authority of Supreme Court — Distribution — Effective date.— The Supreme Court of the state of New Mexico shall, by rules promulgated from time to time, define and regulate the practice of law within the state of New Mexico. The Supreme Court shall cause such rules to be printed and distributed to all members of the bar, to applicants for admission, and to all courts within the state of New Mexico and the same shall not become effective until thirty (30) days after the same shall have been made ready for distribution and so distributed.

21-3-1. Rules of pleading, practice and procedure. — A. The Supreme Court of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico for the purpose of simplifying and promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant.

B. The Supreme Court shall cause all rules to be printed and distributed to all members of the bar of the state and to all applicants, and no rule shall become effective until thirty (30) days after it has been so printed and distributed.

21-12-18. Rule 18 — Oral argument.

(a) Settings. Settings for oral argument will be fixed by the appellate court and notice thereof given by the clerk.

(b) Motions. Motions will be decided on briefs, without oral arguments, unless the appellate court, in its discretion, determines otherwise, either on its own motion or on written request of a party.

(c) Request for Oral Argument. Any party may file written request for oral argument at or before the time of filing his first brief addressed to the merits. In the absence of any such request, oral argument will be deemed waived and the cause will stand submitted on briefs unless the appellate court shall otherwise direct.

(d) Order of Argument. Unless otherwise ordered, the party first filing notice of appeal shall open and close the argument. A cross appeal shall be argued with the initial appeal unless the appellate court otherwise directs.

(e) Time for Argument. Oral argument of twenty minutes will be allowed to each side on motions and of thirty minutes on each side as to all other matters unless the time be extended or abridged by the appellate court. A party desiring additional time for argument may make appropriate written request by letter addressed to the clerk a reasonable time in advance of the date set for argument.

(f) Joint Argument. Two or more cases involving the same or related questions may be heard together by leave of the appellate court.

(g) Reargument. Reargument shall not be required to enable a justice or judge who did not heard the original argument to participate in the decision of any cause.

59-10-1. Short title. — This act, sections 59-10-1 through 59-10-37, New Mexico Statutes Annotated, 1953 Compilation, shall be known as the "Workmen's Compensation Act."

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1807

STATE, ex rel GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Appellants,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION TO DISMISS

ORTEGA & SNEAD
by CHARLES P. REYNOLDS
Attorney of Record for Appellees
MICHAEL D. BUSTAMANTE
On the Brief
P. O. Box 2226
Albuquerque, New Mexico 87103

INDEX

INDEX OF AUTHORITIES

CONSTITUTIONS

FEDERAL:

NEW MEXICO:

STATUTES

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1807

STATE, ex rel GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Appellants,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and THE HONORABLE JOE W. WOOD,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW MEXICO

MOTION TO DISMISS

Appellees, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, move the Courts to dismiss this appeal on the following grounds:

1. The United States Supreme Court lacks jurisdiction to hear this appeal under 28 USC §1257(2).

2. The appeal does not present a substantial federal question.

3. The federal questions sought to be reviewed were not expressly passed on by the Supreme Court of the State of New Mexico.

4. The judgment from which the appeal is sought to be taken rests on an adequate non-federal basis.

Appellees further move the Court to award double costs pursuant to title 28 U.S.C., Section 2103. As reason therefor, Appellees state that this appeal is frivolous and has been brought solely for purposes of delay.

STATEMENT OF THE CASE

Appellees are generally in agreement with the statement of the case provided the Court by Appellants in their Jurisdictional Statement. The statement includes many matters of motivation, observation and opinion which are purely personal to counsel for Appellants and thus not properly raised here, but Appellees choose not to quarrel with or object to most such matters. There is, however, additional information which should be provided the Court, and, objection must be lodged against certain portions of the Statement.

First, as additional information, it should be noted that in each of the proceedings initiated by Appellants attempting to overturn the Court of Appeals' decision herein, Appellants asserted several non-federal and non-constitutional grounds in support of their contentions. Pertinent portions of Appellants' Motion for Rehearing in the Court of Appeals[1] and the Petition for Writ of Certiorari in the New

[1]App. A *infra*.

Mexico Supreme Court,[2] containing those contentions are appended hereto. In addition, the entire text of the Petition for Writ of Mandamus[3] is appended, absent the exhibits which were attached to it originally.

Second, Appellees object to Appellants inserting into their statement of the case any matters contained in Appendix H to their Jurisdictional Statement, the "Attorney's Certificate." Appendix H was apparently drafted by counsel for Appellants exclusively for use in this appeal. Its appearance in the Jurisdictional Statement was the first revelation Appellees had of its existence. It was not filed in support of any of Appellants various motions and petitions filed subsequent to the entry of the New Mexico Court of Appeals Opinion in the original action herein.

Appellants are apparently attempting to supply this Court with information, factual and legal about New Mexico law, procedure, tradition and history which they did not provide the New Mexico Courts during their deliberations. Obviously, it is absolutely improper for Appellants to inject new factual contentions into the proceedings at this point. It requires no citation to assert that the United States Supreme Court, indeed all appellate courts, may only, and can only, review the cases before them on the record generated in the proceedings in the lower courts. Allowing Appellants to file affidavits such as Appendix H would require the appellate courts to re-examine and re-find facts in their resolution of appeals brought before them. The problems created by allowing the filing of pleadings such as Appendix H are glaring and demonstrate the absurdity of allowing the practice.

[2]App. B *infra*.
[3]App. C *infra*.

The entire thing might be unworthy of note were it not for the sweeping nature of the contentions made by Mr. Klecan in his Attorney's Certificate, the apparent use being made of his statements and the inaccuracy of certain of the statements contained therein. The Attorney's Certificate includes the following statements:

> Oral argument was a traditional right recognized as such by all the bench and bar.[4]
>
> I believe the rules of Appellant (sic) Procedure provide for an oral argument on an appeal.[5]
>
> The practice of law in New Mexico continues then to function, as to oral argument, at the whim of the New Mexico Court of Appeals.[6]
>
> I sincerely believe that oral argument was a vital step in a complete presentation of my client's legal position in this case.[7]
>
> The Opinion neglected to even treat one major new issue raised in the brief.[8]

Clearly, Appellants seek to create, or bolster, their substantive contentions in this appeal by reference to the material in the Attorney's Certificate. This Appellants simply cannot do.

Finally, through Appendix H, counsel for Appellants is injecting himself into the action as a witness. The tenor of the Attorney's Certificate is purely and simply that of

---

[4]Jurisdictional Statement, p. 34.
[5]Ibid.
[6]Ibid.
[7]Ibid.
[8]Id., p. 35.

a witness called to explain the workings of the New Mexico Appellate Courts. It is fundamental that the factual knowledge [or legal opinion] held by an attorney is absolutely useless and irrelevant as evidence in any case where he is acting as the attorney of record. One cannot be both witness and attorney in the same case. If counsel wished to take up Appellants cause by testifying on their behalf, he should have done so long ago.

Appellants efforts are neither novel or laudable, and should not be rewarded with consideration. Appendix H should be stricken from the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Whether an opinion of the Court of Appeals of the State of New Mexico is a "Statute" of the State of New Mexico within the meaning of Title 28 USC, §1257(2).

2. Whether federal questions substantial enough to warrant assumption of jurisdiction of this appeal by the United States Supreme Court have been raised.

3. Whether the federal questions sought to be decided were passed upon expressly enough by the New Mexico Supreme Court to warrant the assumption of jurisdiction of this appeal by the United States Supreme Court.

4. Whether the decision of the New Mexico Supreme Court was based on adequate, non-federal grounds.

ARGUMENT

POINT I

THE OPINION OF THE COURT OF APPEALS IS NOT A STATUTE WITHIN THE MEANING OF 28 USC §1257(2)

Appellants appear to take for granted that this Court has jurisdiction of this appeal under Title 28 USC §1257(2). The provision is cited only once in their Jurisdictional Statement, where Appellants state, without benefit of citation, that pursuant to §1257(2):

> . . . the actions of the Court of Appeals of the State of New Mexico have the full force and effect of a statute.[1]

Appellants apparently feel that the Opinion of the Court of Appeals, or perhaps the single sentence of the Opinion denying oral argument, is a statute within the meaning of §1257(2)[2]. Appellees submit that in this conclusion, Appellants have grievously erred.

Section 1257(2) grants the U.S. Supreme Court jurisdiction to review by appeal, decisions of the highest court of a state where there has been drawn in question the validity of a "statute" of the state on the grounds of its being repugnant to the constitution or laws of the United States; and, the state court's decision is in favor of the statutes' validity.[3] The specific inquiry on appeal to the United States Supreme Court under §1257(2) is, thus, whether the challenged statute itself [not the judicial decisions upholding it] is contrary to the constitution or the

[1]Jurisdictional Statement, p. 2.
[2]Id., App. F.
[3]28 USC §1257(2).

laws of the United States. The U.S. Supreme Court cases construing the word "statute" as used in §1257(2), and its predecessors have uniformly held that the opinions and decisions of the state courts are not in and of themselves "statutes" of the states.[4]

A clear distinction has been drawn, and uniformly followed, between instances where, in the process of litigating the primary issues in that case a state court has construed a statute [some act of the legislative power of the state] in a manner which gives the statute an unconstitutional effect, and, instances where a statute of a state has been directly attacked as unconstitutional and the state court has upheld the statute in the face of the attack. In the former instance, jurisdiction under §1257(2), or its predecessors, has always been denied because only the judicial branch or power of the state has been involved.[5]

In the case of *Central Land Company v. Laidley*,[6] for example, the court was presented with a question involving the correctness of the construction placed on a state statute controlling the proper method of acknowledgment by married women of deeds conveying real property. The Appellant in *Laidley* asserted that the construction given the statute by the West Virginia Court of Appeals had the effect of impairing the obligation of a contract contrary to the federal constitution. The impairment of contract claim was premised on the assertion that under the state courts' prior

[4]Railroad Company v. Rock, 71 U.S. 177 (1866); Knox v. Exchange Bank, 79 U.S. 379 (1870); Commercial Bank of Cincinnati v. Buckingham's Executives, 46 U.S. 316 (1847); Lehigh Water Company v. Eaton, 121 U.S. 388 (1887); Central Land Company v. Laidley, 159 U.S. 103 (1895); Wood v. Brady, 150 U.S. 18 (1893); St. Paul, Minneapolis and Manitoba Railway Co. v. Todd County, 142 U.S. 282 (1892); Rooker v. Fidelity Trust Co., 261 U.S. 114 (1923).
[5]Ibid.
[6]159 U.S. 103 (1495).

construction of the statute certain rights had vested in the Appellants, and, the state courts could not, constitutionally affect such vested rights by later altering their construction of the statute.[7]

Appellants in *Central Land Company v. Laidley*[8] attempted to proceed to the United States Supreme Court on a writ of error pursuant to a predecessor of §1257(2). Appellee Laidley's motion to dismiss for want of jurisdiction was granted, the court stating:

> The appellate jurisdiction of this court upon writ of error to a state court on the ground that the obligation of a contract has been impaired can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court. . . . If this court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state had erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier in such a case, as long ago as 1847, 'It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the state and not for the correction of alleged errors committed by their judiciary.' Commercial Bank of Cincinnati v. Buckingham, 46 U.S. 5 How. 317, 343 [other citations omitted].[9]

[7] 159 U.S. at 106.
[8] 159 U.S. 103 (1891).
[9] 159 U.S. at 109, 110.

In *Commercial Bank of Cincinnati v. Buckingham's Executors*,[10] Appellants sought to appeal a decision of the Supreme Court of Ohio to the United States Supreme Court under §25 of the Judiciary Act of 1789,[11] the original grant of the appellate jurisdiction now found in §1257(2). Appellants' theory was that the State Supreme Court had erred in construing a certain state statute, and that the misconstruction made the statute unconstitutional. The Court through Justice Grier, was compelled to comment that the Appellants had reached a "most strange conclusion from such premises,"[12] but went on to explain as follows:

> But grant that the decision of that court could have this effect; it would not make a case for the jurisdiction of this court, whose aid can be invoked only where an act alleged to be repugnant to the Constitution of the United States has been decided by the state courts to be valid, and not where any act admitted to be valid has been misconstrued by the court.[13]

The general principle to be gleaned from the cases cited above is that "statute" as used in §1257(2) is limited in its scope to exercises of the states' legislative powers and does not encompass purely judicial pronouncements.[14]

The case of *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*,[15] is most instructive on the point. There, the plaintiff-appellant had been granted an exclusive

[10] 46 U.S. 316 (1847).
[11] 1 Stat. at L. 73, 85, Chapt. 20.
[12] 46 U.S. at 341.
[13] 46 U.S. at 341.
[14] New Orleans Waterworks Company v. Louisiana Sugar Refining Company, 125 U.S. 18 (1888); King Manufacturing Co. v. Augusta, 277 U.S. 100 (1928); Lathrop v. Donahue, 367 U.S. 820 (1961); DeBacker v. Brainerd, 396 U.S. 28 (1969).
[15] 125 U.S. 18 (1888).

right to supply the City of New Orleans with water. Many years subsequent to the granting of such exclusive right to the plaintiff-appellant, the City of New Orleans passed an *ordinance* pursuant to authority of a state statute, giving the defendant-appellee permission to obtain its own water for use at its facilities alone. Appellant filed an action seeking injunctive relief asserting that its exclusive right covered all matters, such as the laying of pipe and conduit, relating to the transport of *all* water within the city. The trial court denied it the relief sought, stating that the appellees' case came within a certain exclusion in the statute relied on by appellant. The Supreme Court of Louisiana affirmed. On motion, the United States Supreme Court dismissed the appeal for lack of jurisdiction reasoning that even though the permission was granted appellee through the form of an ordinance, the passing of the ordinance involved no exercise of legislative power because the statute appellant was relying on itself established a class of persons to be exempted from its operation. The City therefore was left with a purely administrative chore of determining who came within the exemption. Passage of the ordinance was thus not a legislative, but an administrative act; and, the ordinance was not a statute but a mere license. Therefore there was no statute of the state which could be tested for repugnancy to the U.S. Constitution, with the necessary result that the court lacked jurisdiction to hear the appeal.[16]

In *Lathrop v. Donahue*,[17] the Supreme Court was asked to determine the constitutionality of an order of the Wisconsin Supreme Court integrating the Wisconsin State Bar. Plaintiff-appellant filed an action seeking a refund of the dues required of him by the order. In examining its jurisdiction under §1257(2), the court observed that it was the nature of the action taken which controlled the question of whether or not such action constituted a "statute" within the meaning of §1257(2).[18] The United States Supreme Court noted that the final action of the Wisconsin Supreme Court was taken after a period of interplay with the state legislature, both entities seeking a workable policy of integration. The United States Supreme Court also noted that the Wisconsin Supreme Court had acknowledged that in issuing its order it was consciously implementing public policy as declared by the legislature; even though the legislature could not require it to do so. The United States Supreme Court, thus carefully agreed with the Wisconsin Supreme Court's view that its action in issuing the order was not adjudicatory but legislative in character. On that basis, the United States Supreme Court found it had jurisdiction to hear the appeal.

Of note, also, is the case of *DeBacker v. Brainerd*[19] where the Supreme Court dismissed an appeal from a denial of a state habeas corpus proceeding because, among other things, the claimed constitutional defect in state juvenile criminal procedure asserted by appellant was derived from state case law, not from any statutory provisions, and, therefore, the matter could not be brought for review by appeal under §1257(2).[20]

The holdings of the cases cited hereinbefore are, of course, eminently practical as well as legally astute. If the Supreme Court were to broaden the scope of the term "statute" to include judicial opinions, it would undoubtedly be

[16]125 U.S. 18 (1888).
[17]367 U.S. 820 (1961).

[18]The Court cited King Mfg. Co. v. Augusta, supra, n. 14, which contains an exhaustive history of the predecessors to §1257(2).
[19]396 U.S. 28 (1969).
[20]396 U.S. at 32, fn. 6.

inundated by appeals complaining of the actions of state courts across the nation. Every time a state court exercised its discretion in an arguably unconstitutional manner, the Supreme Court could be called on to review the actions of the states' judiciary. Such a construction of §1257(2) would obviously place an impossible burden on the Supreme Court and more importantly, would seriously undermine the concept of federalism which is the genius of the United States system of government.[21]

Applying the reasoning of the numerous cases cited above to the instant case, it is clear that jurisdiction under §1257(2) cannot be sustained. Here, the New Mexico Court of Appeals was called upon to decide an appeal under the New Mexico Workmen's Compensation Act.[22] In the course of its deliberations, the Court of Appeals decided that it could decide the appeal questions without oral arguments. It can safely be assumed that the Court of Appeals was aware of the various state provisions dealing with oral argument when it made its decision. Assuming the Court was cognizant of possible problems in its denial of oral argument, it must have examined such state provisions and construed them as allowing it to act as it did.

If the Court of Appeals actually committed some as yet unascertained error in denying Appellants oral argument, it was error only in the construction of applicable state constitutional provisions, state statutes, and state procedural rules.

Courts are, after all, supposed to construe statutes in the course of their deliberations. Statutory construction in the adjudicatory setting is purely a judicial, not a legislative function. Thus, the Court of Appeals' decision can only be viewed as the purest sort of judicial action.

[21]See cases cited at fn. 4.
[22]N.M.S.A. 59-10-1 *et seq.*

In filing their petition for a writ of mandamus, Appellants were questioning the correctness of a judicial ruling. In no sense can it be said that the petition for writ of mandamus challenged the validity of a state statute as required by §1257(2) because a decision construing a statute cannot itself become a statute.[23].

Moreover, as noted by Appellants, the Court of Appeals has no rule making powers.[24] The Court of Appeals does not even possess superintending powers over the state's lower courts. Therefore, the Court of Appeals, by definition, cannot exercise the legislative power of the State of New Mexico.

The United States Supreme Court therefore lacks jurisdiction to hear this appeal and the appeal should be dismissed with double costs awarded appellees pursuant to Title 28 USC, Section 2103.[25]

POINT II

APPELLANTS HAVE RAISED NO SUBSTANTIAL FEDERAL QUESTIONS FOR REVIEW

As Appellees interpret Appellants rather cryptic statement of the federal questions being raised by them, Appellants essentially have three points they are pursuing:

[23]See cases cited at fn. 4 *supra.*
[24]N.M. Stat. Ann. §18-1-1 (1953 Comp.).
[25]28 USC §2103.

1) The federal Constitution required that notice be given Appellants of the *possibility* of denial of oral argument prior to the publication of the Court of Appeals' Opinion below. (See part A for discussion)

2) The Court of Appeals has by its actions unlawfully promulgated a new rule of appellate procedure in New Mexico, thus violating the federal constitutional guarantee of due process. (See part B for discussion)

3) Due process of law under the federal constitution extends to representation by counsel on appeal in civil cases, and the denial of oral argument deprived Appellants of their right to counsel.[26] (See part C for discussion)

The existence of a substantial federal question involving any of the three points is not supported by the cases cited by Appellants or any other authority. Each of the three points will be discussed separately.

PART A.

There is no exaggeration in asserting that notice and hearing are fundamental concepts in American jurisprudence. They are the vehicles through which our legal institutions seek accurate solutions to problems and through which the integrity of the individual is protected from assault by and through the state.[27] As fundamental as notice and hearing are, however, they are not required in every conceivable case of government impairment of private in-

[26]Jursdictional Statement, pp. 7-12.

[27]Subrin and Dykstra, Notice and the Right to Be Heard: The Significance of Old Friends, 9 Harv. Civ. R. Civ. Lib. Law Rev. 449 (1974).

terest.[28] In deciding what is required in any given set of circumstances, inquiry must be made to determine the nature of the governmental function involved, as well as the nature of the private interest being affected by the governmental action.[29]

In the case at bar, Appellants assert that they have a private interest in preventing tyranny by the state, and that they have a federal constitutional right to be free of unlawful and "arbitrary actions by a state court of appeals;"[30] both of which must be protected or implemented through the Fourteenth Amendment of the Federal Constitution and the notice requirements thereof.[31]

The nature of the governmental function involved and being protected is the freedom of the states' courts to exercise their sound judgment in interpreting their own rules, and to exercise their sound discretion in implementing those rules which are found to be non-mandatory.

Appellants assert that notice must be given of any substantial change in the Appellee Court of Appeals' procedures, even if the applicable rules are structured such that the decision by the court is purely discretionary, with the decision not having a forseeably substantial effect (in Appellees' view) on the final outcome of the action. Oral argument is thus urged by Appellants to be a substantial step in a fundamentally fair appeal.

Appellees maintain that there is no basis in the cases

[28]Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Goldberg v. Kelly, 397 U.S. 254 (1970).

[29]Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Stanley v Illinois, 405 U.S. 645 (1972).

[30]Jurisdictional Statement, p. 10.

[31]U.S. Const. Amend. XIV.

for holding that oral argument is a substantial part of a fair appeal.[32]

First, Appellants concede that there is no constitutional requirement that a state guarantee an appeal.[33]

Second, the cases dealing with the question of whether oral argument is a constitutional requisite to the conduct of a fair hearing, primary or appellate, have uniformly held that being heard orally is not a matter of constitutional magnitude.[34]

FCC v. WJR,[35] is the leading case. There the FCC had licensed another radio station at WJR's frequency and in WJR's effective area. The license was issued without notice to WJR. A petition for reconsideration was filed by WJR along with an alternative request to delay action on the permit until a decision was made in a "clear channel" proceeding where WJR was seeking an increase in its power. The FCC denied the requests without an oral hearing of any kind, and rendered its opinion. The U.S. Court of Appeals for the District of Columbia found that there was a right to oral argument guaranteed by the Fifth Amendment, and remanded the case for oral argument.

The United States Supreme Court granted certiorari stating:

---

[32]FCC v. WJR Goodwill Station, Inc., 337 U.S. 265 (1949); Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[33]Jurisdictional Statement, p. 7.

[34]FCC v. WJR Goodwill Station, Inc., 337 U.S. 265 (1949); National Labor Relations Board v. Local No. 42, International Association of Heat and Frost Insulators and Asbestos Workers [hereinafter NLRB v. Local No. 42], 476 F.2d 275 (3rd Cir. 1973); George W. Bennett Bryson Co. Ltd. v. Norton Lilly & Co. Inc., 502 F.2d 1045 (5th Cir. 1974).

[35]337 U.S. 265 (1949).

> Taken at its literal and explicit import, the Court's broad constitutional ruling cannot be sustained. So taken it would require oral argument upon every question of law. . . . This would be regardless of whether the legal question were substantial or insubstantial; of the substantive nature of the asserted right or interest involved . . . and regardless of the fact that full opportunity for judicial review may be available.[36]

The court noted that it had held that an oral hearing was necessary to assure fairness in some instances, but that in others, argument submitted in writing is sufficient.[37]

> Certainly the Constitution does not require oral argument in *all* cases where only insubstantial of frivolous questions of law, *or indeed even substantial ones* are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings . . .[38] (emphasis supplied)

It is important to note that in *FCC v. WJR*,[39] the Court was dealing with the right to an oral hearing within the context of initial proceedings under the primary jurisdiction of the FCC pursuant to a statute which provided "reasonable opportunity to show cause"[40] [the administrative equivalent of trial on the merits]. In the case at bar, Appellants were not at the primary, fact-finding stages of the litigation. They had full opportunity to present their evidence and arguments at the trial court. On the appellate level, Appellants supplied the Court of Appeals with a full transcript of the proceedings, and they were twice allowed

---

[36]337 U.S. at 275.

[37]337 U.S. at 276.

[38]337 U.S. at 276.

[39]337 U.S. 265 (1949).

[40]47 USC §312(B).

to brief their points on appeal as fully as desired.[41] Notice and hearing in good measure had, thus, already been afforded Appellants when oral argument was denied. That denial cannot be of constitutional import since the private interest involved has been held not to be major.[42]

It should be noted that all of the major new cases treating the question of notice and hearing have involved notice of the fact of the institution of primary, first stage proceedings which are likely to have an immediate impact on individual personal interests.[43] Lack of notice and hearing at that primary stage could very easily make the subsequent remedies available purely illusory.[44] The contrast with the case at bar immediately reveals that notice of denial of oral argument was not required, in any sense, in this case.

In *NLRB v. Local No. 42*,[45] the court held that denial of oral argument, at any stage of the appellate process, was not inconsistent with the federal Constitution or the Federal Rules of Appellate Procedure, specifically, Rule 34(b), which states, in pertinent part:

> . . . requests [for additional time for argument] may be made by letter addressed to the Clerk reasonably in advance of the date fixed for argument and shall be liberally granted if cause therefor is shown. . . .[46]

---

[41]N.M. Stat. Ann. §21-12-8 (1974 Supp.).

[42]See cases cited at fn. 34.

[43]Arnett v. Kennedy, ____ U.S. ____, 94 S.Ct. 1633 (1974); Mitchell v. W. T. Grant Co., ____ U.S. ____, 94 S.Ct. 1895 (1974); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

[44]Goldberg v. Kelly, 397 U.S. 254 (1970); Fuentes v. Shevin, 407 U.S. 67 (1972).

[45]476 F.2d 275 (3rd Cir .1973).

[46]Fed. R. App. Proc., Rule 34 (b).

The court held that the cited language did not mandate oral argument either explicitly or by implication, stating:

> Such a rigid requirement would be incompatible with the need of the judiciary to husband its time by limiting argument to those cases in which the court believes it will aid in the quality of the decision-making process.[47]

The courts have thus subordinated the "right" to oral arguments to their own need for discretion in the search for efficiency and good decision making.[48] It is apparent that Appellees herein are aware of the necessity and desirability of husbanding their time.

Oral argument on appeal is, thus, not required by the federal constitution.

Oral argument on appeal is also not required by any constitutional or statutory provision of the State of New Mexico; Appellants assumption, stated without analysis, to the contrary notwithstanding.

The New Mexico Constitution guarantees one appeal;[49] but it has already been demonstrated above that oral argument on appeal is not required by the federal constitution. Absent language concerning oral argument, the New Mexico Constitution is neutral on the question of whether a right thereto exists under state law.

There are only two other statutory provisions of the

---

[47]476 F.2d at 276.

[48]See, also George W. Bennett Bryson & Co. Ltd. v. Norton Lilly Company, Inc., 502 F.2d 1045 (5th Cir. 1974), where NLRB v. Local No. 42 was explicitly followed. Measuring the criteria outlined by the Court in *Norton Lilly* against the proceedings in the case at bar, it is clear that this was not an appropriate case for oral argument at any rate. 502 F.2d at 1050.

[49]N.M. Const. Art. VI §2.

State of New Mexico which are applicable.[50] Section 16-2A-1 is part of the Supreme Court's Miscellaneous Rules, while §21-12-18 is Rule 18 of the Rules of Appellate Procedure. Fairly read, these two provisions do not make oral argument on appeal a mandatory matter. In fact, the converse is true. All of the discretionary language found in the sections deals with the New Mexico appellate courts' discretionary power to hear [or not hear] oral arguments.[51] On the other hand, all of the mandatory language of the sections are purely administrative and directional.

It is conceded that no New Mexico case has explicitly construed the cited sections. It is obvious, however, that the New Mexico Court of Appeals and Supreme Court have interpreted the statutes in accordance with Appellees' theory herein. Since the question involves the interpretation of state statutes, drafted by one of the courts interpreting them, the United States Supreme Court must accept the state courts' interpretation.[52]

Thus, there is no mandatory right to oral argument on appeal under the laws of the State of New Mexico.

Absent a federal constitutional requirement of oral argument and absent a state right to oral argument, Appellants cannot show any personal interest in life, liberty or property in connection therewith which must be protected by the giving of notice. Absent a protectible interest no requirement of notice can arise,[53] and, thus, no substantial federal question has been raised by the appeal.

---

[50]N.M. Stat. Ann. §16-2A-1(b) & (d); N.M. Stat. Ann. §21-12-18(a) & (c). See Jurisdictional Statement, App. J for the text of these sections.

[51]Thus, oral argument will be deemed waived if a party does not file a timely request therefor, unless the court orders arguments *sua sponte*. N.M. Stat. Ann. §16-2A-1(d); N.M. Stat. Ann. §21-12-18(c).

[52]Missouri *ex rel* Hurwitz v. North, 271 U.S. 40 (1926); Williams v. Kaiser, 323 U.S. 471 (1945).

Certainly, the cases cited by Appellants afford them no succor. *Twining v. New Jersey*,[54] which Appellants utilize as the cornerstone of their argument, concededly is a landmark decision in the development of modern due process theories. However, *Twining* involved only the question whether the due process clause of the Fourteenth amendment applied the restrictions of the Fifth Amendment prohibition against self-incrimination to the states. The Court, in holding that the Fifth Amendment did not apply to the states, embarked on a lengthy discourse concerning the meaning of due process. In the midst of this discourse, the court observed that in the evolution of the due process concept, the courts would have to be careful not to depart recklessly from old norms. The Court stated its cautionary note as follows:

> But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.[55]

It is obvious that Appellants' paraphrase of the above quote is inaccurate and ascribes to it a narrow definition which suits their needs but which is not justified or supported by the context in which it appears in the case.

---

[53]Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); Arnett v. Kennedy, ____ U.S. ____, 94. S.Ct. 1633 (1974); Mitchell v. W. T. Grant Co., ____ U.S. ____, 94 S.Ct. 1895 (1974).

[54]211 U.S. 78 (1908).

[55]211 U.S. at 101.

Appellants cite *FCC v. WJR*[56] in support of their statement that denial of notice was tantamount to a denial of their appeal as of right.[57] The case does not support their contention. As described above, the narrow question decided in *FCC v. WJR* was whether due process required oral argument on a petition for reconsideration of the issuance of a license. No mention is made of any requirement of notice of the denial of an oral hearing. In fact, WJR received notice of the FCC's decision and the denial of an oral hearing simultaneously.

Similarly, *Season-All Industries, Inc. v. Turkiye Sise ve Cam Fabrikalari*,[58] is not supportive of the statement it is cited to. *Turkiye* was an appeal from an order granting summary judgment in favor of defendant. The real question at issue involved the normal inquiry whether as a matter of law there was a factual question which precluded summary judgment. As an aside, more by way of a lecture to the district court, the Court of Appeals noted that it was undesirable to decide summary judgment motions on briefs alone unless it was made clear to the parties that all affidavits necessary to consider the motion were to be filed with the brief. The language dealing with a hearing is thus the purest sort of dictum and has no application to the facts in the case at bar.

Appellants cite *Cohen v. Hurley*,[59] for the proposition that denial of notice was tantamount to a "denial of precedent set by tradition",[60] and therefore the process was defective. *Cohen* dealt with the question whether a state could,

[56] 337 U.S. 265 (1949).
[57] Jurisdictional Statement, p. 8.
[58] 425 F.2d 34 (3rd Cir. 1970).
[59] 366 U.S. 117 (1961).
[60] Jurisdictional Statement, p. 8.

consistent with the Fourteenth Amendment, disbar an attorney who, relying on his state privilege against self-incrimination, had refused to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct. The court held that the disbarment was not violative of the attorney's due process rights, pointing out that the state, and the state bar association, had a substantial interest in conducting investigations of that kind. The court stated:

> That interest is nothing less than the exercise of disciplinary powers which English and American courts for centuries possessed over the members of the bar...[61]

Appellees frankly fail to see the connection between *Cohen v. Hurley*[62] and the notions ascribed to it in the Jurisdictional Statement.

Groendyke Transport, Inc. v. Davis,[63] is also cited in support of the proposition that lack of notice herein was tantamount to a denial of precedent set by tradition. The case actually held that summary disposition of appeals is constitutionally sound and desirable in many instances. In so holding the court noted:

> Oral argument, as such, is rarely, if ever, so essential to elemental fairness as to orbit to a constitutional apogee.[64]

Southside Bank and Trust Company, et al vs. Walston and Company,[65] is cited for the proposition that even in

[61] 366 U.S. at 123.
[62] 366 U.S. 117 (1961).
[63] 406 F.2d 1158 (5th Cir. 1969).
[64] 406 F.2d at 1162.
[65] 425 F.2d 40 (3rd Cir. 1970).

jurisdictions which provide for summary disposition of cases by rule, the case below would have required oral argument. *Southside* has literally nothing to do with the appeal process or oral arguments or notice. Rather it involves an action against a bank and its principal officers for conversion of stock shares, with the indemnity rights of the parties as between themselves the prime issues on appeal.

Appellees choose to asume that Appellants meant to cite *Season All Industries, Inc.*,[66] instead. *Season All* is inapplicable also, however, because as explained above, the language concerning hearings in summary judgment determinations is pure dictum with no relation to the facts and issues of this case.

Finally, Appellants resort to the case of *Wagner Electric Manufacturing Company v. Lyndon*,[67] to bolster their claim that a major violation of due process has occurred in this case. In *Wagner*, Plaintiff Lyndon filed a suit in the state courts of Missouri and had been granted a judgment against Wagner in the amount of $12,000.00. Wagner exhausted all possible state r· nedies attempting to overturn the judgment, but failed. Wagner even applied to the United States Supreme Court for a Writ of Certiorari to review the judgment of the state Supreme Court, but the Writ was denied it. Wagner paid the judgment and costs, after being served with a Writ of Execution, but then immediately filed suit in the United States District Court seeking an injunction against the sheriff who processed the Writ of Execution to keep him from paying the money to the original plaintiff, Lyndon. The case finally found its way into the United States Supreme Court. The United States

[66]425 F.2d 34 (3rd Cir. 1970).
[67]262 U.S. 226 (1923).

Supreme Court was so unimpressed by the assignments of error urged by Wagner that it granted a dismissal for lack of jurisdiction because of the frivolousness of the appeal, and in addition imposed damages of $1500.00 against Wagner for delaying final resolution of the matter.

Appellees assert that the *holding* of Wagner is peculiarly applicable to the case at bar.

Appellants have failed entirely to demonstrate to the court the existence of any substantial federal question arising from the lack of notice of denial of oral argument in the Court of Appeals of the State of New Mexico. This appeal should be dismissed for lack of jurisdiction and because the grounds of the appeal are frivolous.

PART B.

Appellees urge as a second factor creating a substantial federal question the notion that the actions of the Court of Appeals were taken without authority and had the effect of abrogating rules of procedure properly promulgated by the only entity able to do so, the Supreme Court of the State of New Mexico. Again, *Twining v. New Jersey*,[68] is cited in support of their contentions.

Appellants arguments here are based entirely on their unstated assumption that they have a right to oral argument in the Court of Appeals. As demonstrated in Part A above, there is no state created right to oral argument.[69]

Since there is no mandatory right to oral arguments, it

[68]211 U.S. 78 (1908).
[69]See footnotes 49-52.

cannot be asserted that the Court of Appeals has changed the procedural rules of the State of New Mexico. It is clear that this case involves nothing more than the Appellees' good faith interpretation of New Mexico procedural rules and statutes.

PART C.

Appellants assert and have requested this court to hold, that there is a federal constitutional right to "full representation by counsel"[70] on appeal in civil cases. The assertion is frivolous on its face.

Appellants cite absolutely no authority in support of their assertion, and have utterly failed to demonstrate that a substantial federal question is involved. The dearth of citation in their Jurisdictional Statement is understandable since there is no authority which supports their assertion. Appellants' assertion is literally unprecedented.

Certainly, there is no express language in the United States Constitution concerning a right to "full representation by counsel" on appeal in civil cases. Neither is there any language in the Constitution from which such a "right" can be implied.

The Constitution does provide that defendants in criminal prosecutions shall have a right to the "assistance of counsel" for their defense.[71] The Sixth Amendment was made applicable to the states, through the Fourteenth Amendment to the United States Constitution in the case of *Gideon v. Wainwright.*[72] However, the Sixth Amendment

[70]Jurisdictional Statement, p. 9.
[71]U.S. Const. Amend. VI.
[72]372 U.S. 335 (1963).

guarantee is expressly limited to criminal prosecutions and cannot be extended to civil actions.[73]

Appellants are wrong when they assert the existence of a Fourteenth Amendment right to "full representation of counsel" in civil and criminal cases.[74]

All criminal cases dealing with the right to counsel have the Sixth Amendment as their constitutional basis.[75] For example, in *United States v. Walls,*[76] a federal criminal case, defendant's counsel had not been allowed to present closing arguments to the trial court. On appeal, the Court of Appeals held that the denial of an opportunity to argue was an impermissible limitation on the right to counsel. The Court of Appeals ruling was expressly based on the Sixth Amendment. *United States v. Walls,*[77] does not establish a Fourteenth Amendment right to counsel on appeal in civil cases as alleged by Appellants.

United States ex rel Spears v. Johnson,[78] involved, again, the denial of the opportunity to present closing arguments at trial in a criminal case. The court there did mention the words "due process" in its opinion, but, all of the cases the court cited in support of its analysis[79] invoked the

[73]It is assumed that in asserting the existence of a constitutional right to counsel in civil appeals Appellants are not saying that the Sixth Amendment cases are fully analogous and applicable. Appellants cannot be asserting, for example, that the state must provide counsel on appeal for those who cannot obtain their own. See Douglas v. California, 372 U.S. 353 (1962).
[74]Jurisdictional Statement, p. 8.
[75]U.S. Const. Amend. VI; Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); United States v. Walls, 443 F.2d 1220 (6th Cir. 1971).
[76]443 F.2d 1220 (6th Cir. 1971).
[77]443 F.2d 1220 (6th Cir. 1971).
[78]327 F.Supp. 1021 (E.D. Pa. 1971).
[79]Including Douglas v. California, 372 U.S. 353 (1963).

Sixth Amendment for their authority. The court obviously fell prey to sloppy language and analysis.

Appellees' research has revealed no case which has directly held that the Fourteenth Amendment to the federal constitution requires "full representation of counsel" in civil cases at the trial or appellate level. Several of the cases found in the annotation cited by Appellant hold that the denial of the opportunity to present arguments to the jury or to the court, at the trial level constitutes reversible error.[80] However, none of the cases held that the error was of federal constitutional proportions. Of course, not every error committed by a trial judge can be deemed a denial of due process, even if the error results in the wrongful deprivation of liberty or property.

Appellants' citation of *Nestor v. George*,[81] is to no avail. The appeal in *Nestor* went to the merits of the controversy and did not involve in any way the right to counsel. The Appellate Court, however, apparently noticed that the trial court had limited one party's opening statement in some manner not revealed in the opinion. The court in *Nestor* undertook on its own volition to lecture the world about the right to counsel. Of course, neither of the parties in the case had seen fit to raise the point on appeal. Further, the "right" found by the court in *Nestor* was based on a provision found in the Pennsylvania Constitution not the federal constitution.[82] Thus, the language quoted by Appellants from the case is not only dictum, it is dictum grounded on authority foreign to the United States Constitution.

Granting that the cases do not reveal a basis for creating a federal constitutional right to "full representation by counsel on appeal" in civil cases, the inquiry focuses on the question whether there is a private interest involved which is strong enough and fundamental enough to require federal constitutional status and protection. In the context of the case at bar, the specific inquiry is whether oral argument on appeal is crucial enough to require constitutional protection. The discussion above in Part A of Point II definitively answers the inquiry.[38] Oral argument is rarely, if ever, so essential to fairness as to orbit to a constitutional apogee.[84]

The conclusion is inescapable that there is no federal constitutional right to counsel on appeal in civil cases. Appellants have failed to raise a substantial, or even arguable, federal question in this regard. The appeal should be dismissed.

POINT III

THE FEDERAL QUESTIONS SOUGHT TO BE RAISED HEREIN WERE NOT EXPRESSLY DECIDED BY THE NEW MEXICO SUPREME COURT

In order for the United States Supreme Court to assume jurisdiction of appeals brought to it, it must be demonstrated that the federal questions asserted were decided by the state court, or at the very least, that the judgment of the state court could not have been rendered without deciding the federal questions asserted.[85] Here, the New

[80] 38 A.L.R. 2d 1396, §4-6.
[81] 354 Pa. 19, 46 A.2d 469 (1946).
[82] 354 Pa. 19, 46 A.2d 469, 473 (1946).

[83] See footnotes 33-67.
[84] Croendyke Transport, Inc. v. Davis, 406 F.2d 1158 (5th Cir. 1969).
[85] DeBacker v. Brainerd, 396 U.S. 28 (1969); Harding v. Illinois, 196 U.S. 78 (1904); Lawler v. Walker, 55 U.S. 149 (1852); Honeyman v. Hanan, 300 U.S. 14 (1937).

Mexico Supreme Court denied Appellants' Petition For Writ Of Mandamus without rendering an opinion.[86]

Appellants' Petition For Writ Of Mandamus[87] advanced many theories of error committed by the New Mexico Court of Appeals. Paragraphs 6 through 18 of the Petition advance certain alleged constitutional deficits of the Court of Appeals Opinion.[88] Paragraphs 19 through 21, however, urge purely state statutory grounds for issuance of the Writ.[89] It is in paragraphs 19, 20 and 21 that Appellants state most clearly their theory that the New Mexico statutes and "rules" make oral argument mandatory upon request therefor.

As discussed in Point II, Part A above, the provisions cited by Appellants do not lend themselves exclusively to Appellants' construction. An interpretation allowing for court discretion is possible, and, indeed, more likely.

Also as discussed in Point II, Part A above, an interpretation allowing for discretion negates the possibility that the constitutional deficits urged by Appellants are actually operative in the case.

In other words, construing the state provisions to allow discretion in granting oral arguments resolves all of the questions in the Petition For Writ Of Mandamus. Further, resolution of the problem is complete and requires no other inquiry.

Of course, the actual basis of the New Mexico Supreme

[86]Jurisdictional Statement, App. B.
[87]App. C *infra*.
[88]App. C *infra*.
[89]App. C *infra*.

Court's decision is not known. Thus, because the New Mexico Supreme Court could have disposed of the matter on entirely non-constitutional grounds, it is improper and unnecessary for this court to review the actions of the New Mexico court.

The appeal should, thus, be dismissed.

POINT IV

THE DECISION OF THE NEW MEXICO SUPREME COURT IS BASED ON ADEQUATE NON-FEDERAL GROUNDS

The United States Supreme Court lacks jurisdiction on appeal or certiorari to review decisions of the state courts which are based on adequate non-federal grounds.[90]

As discussed in Point III, the decision of the New Mexico Supreme Court was most probably based on a state statute and did not involve any of the federal questions urged by Appellants. In such a circumstance this court should not, in fact cannot, assume jurisdiction to review.

The appeal should be dismissed with costs assessed against Appellants.

[90]Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673 (1930); New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891).

CONCLUSION

Appellants have failed to demonstrate not only the substantiality, but the very existence, of the federal questions they urge this court to determine. The propositions urged by Appellants are frivolous. The conclusion is inescapable that this appeal has been pursued only for the sake of delaying final resolution of the real case involved here, Mary Ann Garcia's workmen's compensation action.[91] The workmen's compensation action cannot be completed, of course, until this appeal is disposed of. In the meantime, almost four years have elapsed since Mary Ann Garcia was injured on the job. To date she has received not a cent of the compensation adjudged to be her due. This appeal presents the single question whether and when Mary Ann Garcia will receive her benefits.

This appeal should be dismissed with double costs awarded Appellees.[92]

Dated

Respectfully submitted,

ORTEGA & SNEAD

by CHARLES P. REYNOLDS
Attorney of Record for Appellees
MICHAEL D. BUSTAMANTE
On the Brief
P. O. Box 2226
Albuquerque, New Mexico 87103

---

[91]It should be noted that Appellants are pursuing their tactics in the state courts also. They have now appealed the Judgment on the Mandate entered in the workmen's compensation action after affirmance of the original judgment.

[92]28 USC §2103.

Proof of Service

I, Charles P. Reynolds, a member of the Bar of the Supreme Court of the United States, and Counsel of Record for the Court of Appeals of the State of New Mexico and the Honorable Joe Wood, Appellees herein, hereby certify that on 8/2, 1977, pursuant to Paragraph 1 of Rule 33, Rules of the Supreme Court, I served three copies of the above Motion to Dismiss and brief in support thereof on all parties required to be served by depositing such copies in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to the respective post office addresses of all parties requiring service.

Dated: 8/2/77

ORTEGA and SNEAD

By: Charles P. Reynolds
Charles P. Reynolds

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

MARY ANN GARCIA,

Plaintiff-Appellee,

-vs- No. 2547

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Defendants-Appellants.

MOTION FOR RE-HEARING

Other reasons for a rehearing other than what immediately follows will be developed. First reason for rehearing, quote from the Opinion "oral argument is unnecessary" is asserted to be a lack of due process of law in violation of the Fourteenth Amendment of the United States Constitution and in violation of the Due Process Clause of the State of New Mexico, Section 18 of Article II. and that the phrase is error and/or improper procedure calling for a rehearing.

A synthesis of the argument is:

A. The Court of Appeals of New Mexico prepared and mailed to appellee and appellants a form entitled Request for Oral Argument. This is standard procedure.

B. Appellee and appellants both responded to the request and requested oral argument. See Exhibit 1 as demonstrative proof of the above.

C. Court of Appeals did not withdraw request for oral argument.

D. Court of Appeals did not indicate in any way a denial of request for oral argument.

E. Court of Appeals decided the case then stated "oral argument is unnecessary". Conclusion, due process and/or proper procedure was denied to appellants.

I

One of the grounds for the assertion of the lack of due process is the denial of oral argument, which denial constitutes a departure from the long established procedures on appeals and which was completely unannounced as to this case or any group of cases and the denial of oral argument is thus not predicated on any basis or criterion. The sole statement on the above indicates lack of due process. That sole statement in the Opinion where for the first time the parties were noticed, after the fact, that oral argument would not be granted is "oral argument is unnecessary". The summary denial in the above fashion constitutes a factor indicative of a lack of due process. The grounds for the denial is predicated upon a lack of due process, reason or basis and is solely contained in the word "unnecessary". No explanation or even indication of the "why" behind the word unnecessary is present in the Opinion nor can it reasonably be deduced from anything in the Opinion.

The composite of the above, we submit, violates due process both as to the United States Constitution and the New Mexico Constitution, supra.

As a customary procedure, which we believe to be universal, in the Court of Appeals of New Mexico, a form is submitted to counsel for all parties to the appeal wherein the Court of Appeals has asked the parties to indicate if they want an oral argument. In such submitted request, initiated by the court itself, a type of legal procedure is undertaken relative to oral argument and would make the

question of oral argument a judicial step of the appellate process. Nowhere in the mailed request or in any of its procedures is it indicated that the parties may not get it; that is oral argument. Appellants in this case requested oral argument. No indication was ever given that oral argument would not take place. Only in the last paragraph do we find a statement that the request for oral argument was denied. This, of course, coming after the case had been decided. The peremptory disposition in this matter violates due process, we submit, and if it did not violate constitutional provisions, we submit that it would violate procedures and safeguards that make this type of disposition a legal error and that the error thus involved would be in and of itself grounds for a rehearing and the granting of an oral argument.

We point out that this Opinion was authored by the Chief Judge. However, the Opinion contains two different and distinct decisions. One is the affirmance of the lower court's compensation award. The other is the unnoticed disposition of the request for oral argument. The Opinion on the compensation award was concurred in by two associate justices. The conclusion of "unnecessary" is not necessarily within the procedures for a concurrence, especially when no basis is stated. If no basis for being "unnecessary" is stated, it would be hard to conclude why any of the three judges could speak for the others in this issue. This would be true because no basis is found in the court's decision or rules of procedure which would determine an oral argument as being necessary or unnecessary. It is a practical conclusion that an author of an opinion may consider the reasons advanced in his opinion to be subjectively so overwhelming that nothing said in an oral argument would furnish any grounds for a change of mind; however, it is respectfully submitted that the very purpose of an oral argument is to permit the testing of a judicial conclusion within a well-recognized legal procedure, namely *the oral argument*.

The process by which members of a court confer and

decide a case is beyond the observation of anyone. In an opinion concurred in by concurring members, the concurrence would go not only to the result, but presumably to the reasons. However, the concurrence in another writer's opinion might be affected if contrary forces came into play through an oral argument and we submit that to close the possibility of an oral advancement of legal ideas, explanations and interpretations of facts does under the circumstances, argue against the elimination of the oral argument and argues for a reconsideration of this case with an oral argument.

We submit that this question should not be decided as a bare bone principle of constitutional law. That the issue thus presented transcends the question whether a particular principle of substantive workmen's compensation law should be applied to this case or whether this or that interpretation of a statute should be applied to this particular case. The question presented is whether the opportunity to present matters by either party can be thus handled in one sentence under the recognized consistencies and procedures established within the court. It is true that often times on any issue the spoken word, with the speaker visibly articulating his position, can be a grounds for the communication of truth which cannot be duplicated by a written document. The above becomes more cogent if parties are led to believe that they will have a right to develop vocally the ideas put on paper. A restriction upon the written word is a part of our rules of civil procedure. It has, at no time, been envisioned or decreed that every facet of development must be stated in a written brief. To deny without notice a hoped for vocalization of a written document is a suspension of due process or at least erroneous procedure, we respectfully submit.

In regard to error specifically within the Opinion, the same must be viewed in the light of denial of argument. The author of the Opinion sees facts with his own conclusions and the certitude of the terse conclusion is not borne

out by the transcript, but again this is a matter of "argument" wherein objective standards judging the conclusion should apply. Reference is made to the following conclusion as illustrative: "Both Dr. Hollinger's and Dr. Parnall's testimony meet this requirement." This again is a matter of argument. The Opinion along the same line on Page 3 says "Defendants misconstrue Dr. Hollinger's testimony." The defendants can only say that they would certainly welcome and highly desire an opportunity to argue Dr. Hollinger's testimony and its effects. How can it be said that Dr. Hollinger has produced testimony in conformity with Section 59-10-13.3 (B) during the period in question when he expressly admitted his inability to pass judgment upon that very issue? Apparently the Opinion contends, other statements by Dr. Hollinger referred to in lines 23 and 24 of the Opinion when he was not addressing himself directly to the questions at stake, override his admitted inability to be a witness for the period in question. We submit this to be error. The testimony that the Opinion cites is not in relationship to nor in response to the very question which must be decisive. The value of an oral argument is not solely elucidating points of law. More frequently, the argument is directed to pointing out the actual facts as they occurred at trial time and are reflected in the transcript. This was a very lengthy trial and the denial of an opportunity to corelate and bring before a three man court the presuasiveness of all the evidence and its interrelationship in an oral argument is a denial of a real and substantial right.

The Opinion does not pass upon a substantial number of points of error raised by the appellants. For instance, "The Court Erred in Refusing Defendant's Offer of Proof on the Plaintiffs Failure to Request Additional Medical Services."

On Page 4, lines 9-19, the Opinion errs in attributing an argument to the appellant which was not made. The Opinion by destroying this straw argument would appear to generate false support contrary to the appellants position.

It certainly is not true that the appellants ever made the contention that only "physical condition is involved in determining disability". Again, the error of denying oral argument effectively bars informing each member of the presiding panel that the contention of the applicants is not that. The Opinion cites the Goolsby case, 80 NM 59, 451 P2d 308 (Ct. App. 1969) which was never questioned by anybody in this case. If appellants' contention was that "only physical condition is involved in determining disability" then it is agreed that on this particular point oral argument is unnecessary; however in fact, the matters urged by the appellants and argued by the appellee are not matters decided by the Goolsby case, supra.

The Opinion is further in error in structuring the case in a manner at variance with the trial level. The appellants urged as error the submission of certain Findings and Conclusions of Law, Page 11, and the court below did not make said Findings nor did it make any contrary findings. We submit it is error for the court to refuse to decide such issues, but the Opinion, without allowing any Argument, fills in this gap which is actually a trial court function. What is presented is, how do you appeal an appellate court's assumptions of a trial court's duty and obligation? To structure an opinion that presents this impossible situation, we submit, is error.

The Opinion says that "The trial court found that plaintiff was totally disabled at the time of trial and had been since the accident on December 31, 1973" as a means of finding against the appellants' contentions. We submit the Opinion never got to the contentions actually raised by the appellants. There are certain matters which cannot, consistent with objective realities, be summed up by the phrase "defendants ask us to weigh the evidence, determine that Dr. Hollinger was not to be believed and hold that the facts are those inferable from Dr. Parnall's testimony." Quite the contrary is true. The matter was presented to the court and not decided. See Page 11 of Appellants' Brief-in-

Chief. One specific instance is the issue of the adequacy of medical services provided by the employer. (Page 12) It is not that the trial court ruled adversely to our position, it is simply that it did not rule at all. It certainly is not consistent with the case as we recall trying it, briefing it and reading it from the transcript. That we have ever asked this court in this case, or in any other case, to perform the function of weighing the evidence is error.

Error is urged in ignoring the New Mexico case of *Beckwith v. Cactus Drilling Corporation*, 84 NM 565, 505 P2d 1241 (1973) in connection with the question of providing medical services and treating the matter as if there was no relationship to this case when, in fact, it was the principle question relied upon by the appellants. Again, an opportunity to show and to argue Beckwith, supra, is error.

Error is claimed in the Opinion because of the inapplicability of the facts in *Johnson v. Armstrong & Armstrong*, 41 NM 206, 66 P2d 992 (1937). It is urged that the facts therein related do not aply to this case nor does the language cited in the Opinion refer to anything but "cases of emergency like the one here considered" and actually the Johnson case, supra, was primarily concerned with the validity of a suit by a physician against the compensation carrier and arising out of a settlement. Again, this was not a decision at the trial level, but erroneously constituted a trial as to the matter at the appellate level with no opportunity to persuade the appellate court thus acting as to the inapplicability or validity or appropriateness of the cited authority as to the question involved.

Error is claimed relative to the ruling and interpretation of Sec. 59-10-19.1 (B) and its applicability to the facts of this case. Basis of error is that it is unrealistic per se since the Opinion abstracts a practical provision of the statue and posits an impossible, impractical and unrealistic burden upon the employer and in effect nullifies the act and

it construes the section referred to above so as to uphold the ruling of the court below.

The denial of oral argument only serves to prevent and bar an opportunity to show the inappropriateness of the ruling in the Opinion on this matter and the use of judicial legislation. To hold that the use of such a term as "passive willingness" as a term written into the provisions of the statute is an indication that an oral argument should have been allowed or should be allowed now at this stage of the proceeding. The trial judge did not rule on that basis. The appellee did not argue on that basis. To introduce into the law of compensation this new phrase is to go against the law of the case and amounts to, in effect, a trial court Finding of Fact or resulting Conclusion of Law for the first time. It is, in effect, to take over the rulings of the trial at the appellate level which in itself and by denying oral argument is in reality a denial of an appeal and by our constitutional provisions, one appeal is guaranteed. The trial judge ruled on this issue on TR 266. The quality of an oral argument that could have been advanced may not have altered the result, but again history is replete with instances where a more complete treatment of principles and a more comprehensive arrangement of facts on which a principle is based has produced contrary results from what was first thought to be conclusive. Attention is directed to Pages 265 through 287 showing what we respectfully submit is the impracticality of the matter. The approach of the Opinion on this subject, we submit, is error. We respectfully submit that to consider what the claimant did in the period immediately following the accident, and by that I mean up until April, indicates no reason for the employer to be alerted to the furnishing of medical services. One of the strong bits of evidence there is Dr. Francis' bill was never submitted or offered in evidence in this case. The claimant left employment denying injury. The claimant applied for another job disclaiming injury. Is the employer bound to set up some type of continuing surveillance after an employee has left his employment? TR. 280. Is an employer now obligated

to those persons who have sustained an injury in the course of employment and terminated to give them some type of written assurance or promise that medical services will be furnished in the future when there is no indication of any injury? Is the employer obligated to know by some system of investigation that the claimant was contacting Dr. Francis? (TR 284). We respectfully submit that the court's ruling here and of itself is grounds for a new trial.

Under standard methods of procedure, the only judge the parties at the trial level can take issue with is the trial judge. The law of the case become highly significant. There would be no way in which any party could ascertain that this question of medical expenses under Section 59-10-19.1, supra, would be decided on a phrase more than "passive willingness" and that in effect the employer has to make a record of some kind in order for the phrase to apply. When the phrase and interpretation comes at the appellate level there is no opportunity to present evidence on the question. Result, the law of the case, in this instance, was established by the Opinion without oral argument and due process was denied because there was no opportunity to respond to a requirement that either system of some continual observation, post-employment, or some type of notice at the time of termination.

The Opinion uses the phrase "they must have affirmatively offered the services". It is respectfully submitted that this cannot be done unless there is knowledge of the need for the services. Defense counsel made this statement ". . . what she says to the employer has everything to do with — or doesn't say, has something to do with the nature and extent of her injury." (TR. 258) We submit that the court's Opinion is an improper interpretation inconsistent with the statute and its purpose. To allow treatment for injuries to be recoverable without notice of even the existence of a claimed injury at the time of termination or any time thereafter, allows the development of a potential lawsuit

without any opportunity of investigation, treatment or observation.

The denial of this opportunity is not solely a denial of a practical, legal or financial opportunity to the employer, but also could be a disadvantage to the claimant. Workmen's compensation injuries are more than a trial in a court. They are physical factors also. To establish as a matter of policy that a workman can disregard the employer and the employer's medical services and can disregard notice to the employer of even the existence of an injury for which he seeks treatment long after termination of employment, and can continue to take treatment of an extensive nature with great medical expense, all without notice, at least for a period of a year from the time of the accident, can encourage the selection of physicians as a matter of social legal policy, which position may be motivated more as to the physicians ability to perform in legal medicine and prevent the opportunity to the claimant to have highly qualified physicians made available to her for the treatment of injuries. Since we are dealing with an interpretation of a statute for the first time, we submit that the practical consequence, including the physical well-being of the claimant and her rehabilitation, are also factors to be considered. We submit that it is of some significance in this case that very early, at least in January or February, the claimant had an attorney. (TR. 268) Therefore, if notice of a continuing injury to the employer or of the need for medical service was present, it certainly must be presumed that knowledge of the compensation act was available for and on behalf of the plaintiff and could have been exercised. Many factors may rightfully be considered in this regard which we respectfully submit point to a very helpful function in an oral argument.

It is further submitted that without an oral argument, the attorneys fees are excessive and that to enter a Judgment in that amount ($3,000) without an opportunity for oral argument is further grounds that due process under the Federal Constitution and the State Constitution is lacking.

We respecfully request an opportunity to present all of these arguments and request a rehearing on this case because of the errors and the denial of the opportunity to present oral argument.

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
Attorneys for Defendants-Appellants
Suite 1221, 505 Marquette NW
Albuquerque, N. M. 87101
Tel.: 243-7731

I HEREBY CERTIFY that a true copy of the foregoing was delivered to opposing counsel this 28th day of January, 1977.

E. E. KLECAN

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Defendants-Petitioners,

No. 2547

-vs-

ORIGINAL PROCEEDING ON CERTIORARI

MARY ANN GARCIA,

Plaintiff-Respondent.

PETITION FOR WRIT OF CERTIORARI

For the Plaintiff-Respondent:

ORTEGA, SNEAD,
DIXON & HANNA
Attorneys at Law
Albuquerque, New Mexico 87103
By: MR. ARTURO G. ORTEGA

For the Defendants-Petitioners:

KLECAN & ROACH, P.A.
Attorneys at Law
Suite 1221-505 Marquette, N.W.
Albuquerque, New Mexico 87101
By: MR. EUGENE E. KLECAN
MR. MARK J. KLECAN

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

GENUINE PARTS COMPANY and
SENTRY INSURANCE COMPANY,

Defendants-Petitioners,

vs. No. 2547

MARY ANN GARCIA, ORIGINAL PROCEEDING

Plaintiff-Respondent ON CERTIORARI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was delivered to Ortega, Snead, Dixon & Hanna, Attorneys at Law, this ... day of February, 1977.

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
Attorneys for Petitioners
Suite 1221, 505 Marquette, NW
Albuquerque, New Mexico 87101
Telephone: (505) 243-7731

ARGUMENT AS TO POINT O, i-vi WHICH QUESTIONS RAISE THE QUESTION OF ELIMINATION OF ORAL ARGUMENT.

Rule 18 of rules governing appeals to the Supreme Court and Court of Appeals, N.M.S.A.
indicates that it is error to do what the Opinion did in stating "oral argument is unnecessary".

Rule 18 (b) speaks of motions and states that oral argument is discretionary in regard to *motions.* We, therefore submit that oral argument is indicated as a matter of right in the appellate review of the entire case.

We also submit that Rule 18 (c) entitled "Request for Oral Argument" indicates that oral argument is required by the rules since it states that without a request oral argument "will be deemed waived". We ask the legal question: How can a party waive something which is not his as a matter of right? We assert the right to oral argument by this question: Does not the private practitioner of law and does not private litigants have rights which must be recognized by the government acting through its judiciary at the Court of Appeals level? Is not this right of oral argument one which a government cannot disregard under some type of judicial discretion?

Furthermore, Sections (d), (e), (f) and (g) concern the procedures and limitations upon the type of oral argument and methods of oral argument covered by the rules. However, we submit that these sections are on the assumption that there is a right to oral argument.

Rule 18 (a) indicates that settings for oral argument will be fixed by the court. Does this not indicate that the question of the existence of the right to oral argument is assumed? We conclude that Rule 18 does require that the government acting through its judiciary grant oral argument under the conditions as specified therein. We submit

that the fact this constitutes a pronouncement from the judiciary rather than the legislature does not indicate it can be withheld at the choice of a particular court in a particular case. When this is done, it violates the equal protection of the laws and becomes violative of that right as guaranteed by the Constitution of the State of New Mexico and the Constitution of the United States of America, Fourteenth Amendment, both of which are restrictions placed upon a governmental body and at the same time a guarantee of a right to a private citizen. Looked at from the viewpoint of who almost universally makes oral argument, we respectfully submit that the private practice of law being an integral part of our judicial system in its functions is entitled to the constitutional guarantees of the New Mexico Constitution and of the Fourteenth Amendment to the Constitution of the United States.

We respectfully submit that whatever the reason, lack of time, overcrowded dockets, etc. is not any basis for a denial of a right for oral argument such as is provided under Rule 18 and as we submit, which is fortified by constitutional provisions as stated above.

Oral argument is also made mandatory by New Mexico Supreme Court Miscellaneous Rules. Rule 1, N.M.S.A. 16-2A-1 (b) uses mandatory language in stating that settings for oral argument *will* be fixed by the court and notice given to counsel. Other language in that rule enforces the fact that oral argument is mandatory. It is also clear that the Rules of Practice and Procedure of the Supreme Court are also made applicable to the Court of Appeals. N.M.S.A. 21-2-2, 1953 Comp. Rule 2 of the Miscellaneous Rules, N.M. S.A. 16-2A-2 (d) also makes it a mandatory function of the Clerk of the Court to make up calendars for oral argument and give attorneys at least five days notice of the setting for oral argument. Again the language in both of these rules is mandatory as far as oral argument is concerned.

It is further a violation of procedural due process to

allow some appeals oral argument and others not with no set rule of procedure defining which cases would qualify for oral argument and which does not. It is clear that a state may prescribe rules of a public procedure, but such rules governing appeals must apply uniformly to all cases. 16 Am. Jur. 2d, Constitutional Law, Sec. 584.

CONCLUSION

The Court of Appeals' decision in the case at bar makes sweeping changes in the Workman's Compensation Law of the State of New Mexico. Yet, no opportunity was given for oral argument. Because of the numerous conflicts with prior appellate decisions in this State, and because of the issues of substantial public interest involved, petitioners seek the issuance of a writ of certiorari.

Respectfully submitted,

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
Attorneys for Petitioners
Suite 1221, 505 Marquette Ave., NW
Albuquerque, New Mexico 87101
Telephone: (505) 243-7731

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

STATE, ex rel, GENUINE PARTS COMPANY and SENTRY INSURANCE COMPANY,

Petitioners,

vs.

COURT OF APPEALS OF THE STATE OF NEW MEXICO and the HONORABLE JOE W. WOOD,

Respondents.

PETITION FOR WRIT OF MANDAMUS

COME NOW the Petitioners, Genuine Parts Company and Sentry Insurance Company, and state:

1. That Petitioners were defendants in a Workmen's Compensation proceeding which was tried in the District Court of Bernalillo County. Petitioners took an appeal from a final judgment awarding a recovery to the claimant, which appeal is taken to the Court of Appeals for the State of New Mexico.

2. That the Court of Appeals in an opinion written by Chief Justice Wood affirmed the decision and judgment of the lower Court of Bernalillo County by an opinion dated and filed in the Court of Appeals on January 18, 1977.

3. That the Petitioners filed a motion for rehearing

which was denied by the Chief Judge on January 31, 1977. The petition for rehearing had been filed on January 28, 1977. Petitioners filed a petition for certiorari on February 21, 1977 in the Suprome Court of the State of New Mexico. The same being case No. 11293 in the Supreme Court of New Mexico. The Supreme Court of New Mexico denied the petition for certiorari in Court of Appeals No. 2547, and notice of the denial of the petition for writ of certiorari was received by Petitioners on March 2, 1977. A copy of the Court of Appeals opinion in Court of Appeals Cause No. 2547 is attached hereto as Exhibit I. On March 2, 1977, a mandate from the Clerk of the Court of Appeals of the State of New Mexico was issued. A true copy of the mandate was received by the Petitioners on March 4, 1977. A copy of the same is attached to this petition as Exhibit II.

4. That page 9 of the Court of Appeals opinion which is in one paragraph and is the last page of the opinion is the subject matter of this petition. In particular, the statement on line 1 of page 9, "Oral argument is unnecessary; the judgment is affirmed."

5. That the above quoted statement in the opinion is claimed to be in violation of the Constitution of the State of New Mexico, the Constitution of the United States of America, Article XIV, the Rules of Court Governing Appeals under the specific circumstances of the appeal and applicable constitutional provisions and rules.

6. That this petition is not based upon a broad question of whether an oral argument is required under all circumstances and conditions. The petitioners contend a violation of due process and/or improper and illegal and unauthorized procedure by the Appellate Court of the State of New Mexico in stating for the first time at the conclusion of an opinion that "oral argument is unnecessary" under the circumstances of this case which are as follows:

A. The Court of Appeals of New Mexico prepared

and mailed to appellee and appellants a form entitled Request for Oral Argument. This is standard procedure.

B. Appellee and appellants both responded to the request and requested oral argument.

C. The Court of Appeals did not withdraw request for oral argument.

D. The Court of Appeals did not indicate in any way a denial of request for oral argument.

E. The Court of Appeals decided the case then stated "oral argument is unnecessary." Conclusion, due process and/or proper procedure was denied to appellants.

7. That in addition, your Petitioners are informed and believe that over a period of more than 20 years, Petitioners' attorney of record had been frequently in the Appellate Court of the State of New Mexico. That over this extended period of time, with one exception[1], any request for oral argument on an appeal was never taken away from Petitioners' attorney.

8. That to Petitioners' knowledge, no change over this period of time has been made in the procedures for an appeal in the Appellate Courts of New Mexico which would tend to diminish the right to an oral argument on an appeal.

9. That the request form for oral argument by virtue of custom and practice and existing rules of procedure for appeals which, at a minimum, require some type of notice to your Petitioners if the same were to be abruptly ended and a precedent of such long-standing abolished in such a fashion as was done in this particular instance.

10. That the allegedly wrongful act of the Court of Appeals by eliminating in such a fashion an oral argument

[1]*Barbieri* vs. *Jennings*, Court of Appeals decision entered on November 30, 1976.

in this cause is a procedure which was initially executed in the opinion in the Court of Appeals for the first time and for which any possible opportunity of opposition or persuasive argument was eliminated. Right of representation was thereby reduced in violation of the United States Constitution and the New Mexico Constitution (Fourteenth Amendment, United States Constitution; Article II, Section 18 of the New Mexico Constitution).

11. That the elimination of the oral argument at that stage of the proceeding, unannounced and without opportunity for opposition, is the elimination of the practice of law in the State of New Mexico to the extent that it has functioned for decades in this State. This constitutes, as to the Petitioners, a violation of due process under the United States Constitution's Fourteenth Amendment and the New Mexico Constitution, Article II, Section 18.

12. That N.M.S.A. §21-3-1 demands that Rules not abridge or modify the "substantive rights of any litigant." That the litigant has the substantive and/or due process right not to have procedural steps eliminated contrary to law.

13. That the failure to establish any standards by which oral arguments would be considered necessary or unnecessary is in itself a violation of the Constitution and the rights of your Petitioners under the Constitution of the United States under the Fourteenth Amendment and the Constitution of New Mexico.

14. That an unstandardized assertion of the lack of necessity for oral argument in a Court of Appeals is in violation of the equal protection of laws guaranteed to citizens of the United States by the Constitution of the State of New Mexico and by the Fourteenth Amendment to the Constitution of the United States of America. That oral arguments on all cases has not been abolished. Only an isolated case is denied the right without any standard of measurement. That such a procedure having no basis or guide is a denial

of the equal protection clause of due process. That to deny these litigants an oral argument is to discriminate against them with no valid reason for the same. (Violation of the Fourteenth Amendment of the Constitution of the United States of America).

15. That the act of the Court of Appeals to have arbitrarily selected these litigants as the subject of their discriminatory act is to directly attack the right of representation by counsel and is itself unconstitutional.

16. That the Constitution of the State of New Mexico guarantees the right of an appeal in a civil action. That the due process clause of the Constitution of the State of New Mexico and the Fourteenth Amendment of the Constitution of the United States guarantees that an appeal must be one in which due process and equal protection of the laws is accorded to all litigants. The Constitutional guarantees are for the benefit of the private litigants and are not subject to being abrogated or set aside by the actions of the Court of Appeals.

17. That if the long-established procedure of oral argument be considered a Rule of Procedure then the same cannot be eliminated by the Court of Appeals since they would be and did exceed "their" powers and invaded the power of the Supreme Court. (§21-3-1) That the method of the Court of Appeals in any event is in violation of due process which requires a Rule to be promulgated 30 days prior to its effective date. (§21-3-1 B) That the action of the Court of Appeals is in legal and constitutional violation of the same. (Fourteenth Amendment, Constitution of the United States; Due Process Clause, Constitution of New Mexico).

18. That the regulation of the practice of law is not within the province of the Court of Appeals. That the decision of the Court of Appeals in the instant case is a usurpation of a judicial function. That the statutes wherein regulation of the practice of law is granted to the *Supreme*

Court provides that the same shall be done by Rule. (N.M. S.A. §18-1-1). That the action by the Court of Appeals was not done by Rule and is by that very fact unauthorized and unconstitutional. (Fourteenth Amendment, Constitution of the United States; Due Process Clause, Constitution of New Mexico).

19. That the right to an oral argument is expressly granted and made mandatory as to the Appellate Court by Rule 18, Rules of Appellate Procedure for Civil Cases, N.M. Stat. Ann. §21-12-18 (1975 Pocket Supp.) wherein at Rule 18(c) there is the following language:

> Oral argument . . . *will be allowed* . . . of thirty minutes on each side as to all other matters. (Emphasis added).

The term "other" includes the hearing on the appeal. A copy of Rule 18 is attached hereto as Exhibit III.

20. That the "time" permitted, i.e. 30 minutes, can be "extended or abridged," Rule 18(e). N.M. Stat. Ann. §21-12-18(e) (1975 Pocket Supp.), but it cannot be eliminated. The meaning of "abridged" is "shortened, condensed". The World Book Dictionary, Vol. 1, 1974 Edition, Published by Thorndike Barnhart.

21. That Rule 18(a), supra, uses mandatory language in requiring the Court to set oral argument and in requiring the Clerk to give notice thereof. Rule 18(a), supra. N.M. Stat. Ann. §21-12-18(a), supra.

22. That Mandamus lies to compel the Court of Appeals to "fix" a sitting date for oral argument.

23. That Mandamus lies to require the Clerk of the Court of Appeals to give "notice" of the date of the oral argument to all parties.

24. That Mandamus lies to compel the Court of Appeals

to accord the litigants the oral argument which all parties have requested.

25. That Mandamus lies to compel the Court of Appeals to allow the parties through their attorneys the right to make an oral argument in behalf of their clients.

26. That Mandamus lies to compel the Court of Appeals to recall its mandate to the District Court of Bernalillo County and to withdraw its opinion rendered prematurely and in violation of the legal and constitutional rights of the parties and in violation of its own Rules of Appellate Procedure.

27. That the omission of legally necessary steps in the appellate procedure is good cause for the recall of a mandate.

28. That Mandamus lies to reinstate an appeal dismissed in effect by improper procedure.

29. That Mandamus lies to require that an appeal be heard by Justices who did not participate in a prior improper appeal.

30. That the rule-making power of the Supreme Court as to the Court of Appeals carries with it the power to compel adherence to the Rules and Mandamus is the proper procedure for so doing.

WHEREFORE Petitioners pray that a Writ of Mandamus issue to the Court of Appeals, to the Honorable Joe W. Wood, and to the Clerk of the Court of Appeals of the State of New Mexico, compelling them to withdraw an opinion and mandate heretofore filed in Court of Appeals cause number 2547, and to accord to Petitioners an appeal pursuant to law and that said Court and its members and Clerk take appropriate steps to recall the mandate heretofore issued and reinstate the cause on the docket of the

Court of Appeals or to certify said appeal to the Supreme Court of the State of New Mexico.

That a Judgment on the mandate has not been entered.

Respectfully submitted,

KLECAN & ROACH, P.A.

EUGENE E. KLECAN
Attorneys for Petitioners
Suite 1221
505 Marquette N.W.
Albuquerque, New Mexico 87101

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Comes now the undersigned on behalf of Petitioners Genuine Parts Company and Sentry Insurance Company and under oath deposes and says: That he verily believes the facts contained in the foregoing Petition to be true to the best of his information.

EUGENE E. KLECAN

SUBSCRIBED AND SWORN to before me this ..... day of March, 1977.

.....
Notary Public

My Commission Expires:

.....